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nited States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1265.

SUMNER DRESSER, Administrator, Defendant, Appellant,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

No. 1266.

GEORGE W. GALE et al., Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

No. 1267.

CLARENCE ALFRED BUNKER et al., Administrators, Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

ppeals from the District Court of the United States for the District of Massachusetts.

Before Dodge, Aldrich, and Brown, JJ.

Opinion of the Court.

DGE, *J.*: MARCH 5, 1918.

These are appeals from the District Court, in a suit in equity by e receiver of the National City Bank of Cambridge, brought in 1910 der Sec. 24, par. 16, of the Judicial Code. Each of the five de-ndants named in the bill was a director of said bank during the ole or some part of the period between November, 1906, and Feb-ary, 1910. The defendants Edwin Dresser, Sumner Dresser and orge W. Gale were directors, and Edwin Dresser was president, ring the whole of said period, and for some years prior thereto. e defendants David A. Barber and George E. Richardson were ectors from January, 1907, during the remainder of said period. the defalcations during said period of one Coleman, employed the Bank in various capacities, the bank lost $310,143.02 in all. e defendants Edwin Dresser and George E. Richardson died after suit was begun, but before the final decree. The defendant Gale

has died pending these appeals. The District Court has held the said surviving defendants, and the estates of those deceased, liable for $283,218.20 of said total amount; that having been the amount of Coleman's defalcations after September 30, 1907, and lost to the bank, as the court found, through negligence on their part as directors; from which decree these appeals are taken.

The evidence in the case was heard by a special master. It consisted largely of oral testimony before him bearing upon the question of negligence. It came before the District Court, in connection with exceptions to his final report, upon a printed record containing, among other things, the report of the oral testimony so given. The master expressly found no negligence proved and none of the defendants liable for any part of said total defalcations.

The opinion of the District Court, 229 F. R. 772, sets forth fully the principal facts involved, with the court's reasons for rejecting in part the conclusions reached by the master, and the different conclusions adopted by it. Although the plaintiff receiver recovers less than he claimed by the decree below, he has not appealed therefrom.

1. In dealing with the master's report, the court held that his findings were to be regarded as presumptively correct, and they were sustained except so far as the court regarded them as clearly against the weight of the evidence reported, or so inconsistent with one another that they could not properly stand. This view as to the weight due to the master's findings the court based upon Kimberley v. Arms, 129 U. S. 512, and the terms of the order of reference to the master. Davis v. Schwartz, 155 U. S. 631, relied upon by the defendants as requiring that the master's findings of fact be regarded as unassailable so far as depending "upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding," was distinguished on the ground that the order of reference therein dealt with contained no reservation of the right of review as did the order of reference in this case. We find no error in the view adopted by the court.

2. The earliest in date of the failures in due performance of their duties found by the court to have been proved against the directors, is a failure to have the bank's books properly examined on September 30, 1907.

When Coleman began his depredations in November, 1906, he was acting as bookkeeper and also paying and receiving teller. He had been bookkeeper since January, 1904, and had held both the above positions since October, 1905. He continued to hold them both until November, 1907. In that month a separate teller was employed and Coleman was thereafter bookkeeper only. From January, 1904, the individual or depositors' ledger, important in this case, was in his sole charge. While bookkeeper only he did not, but while teller also he did, have the handling of the money coming into the bank day by day.

The methods whereby he accomplished and concealed his thefts are set forth in the opinion below and need not be here restated in detail. They were ingenious, and appear to have been altogether novel. Earl, the cashier, had habitually let him keep the depositors'

ledger without verifying his work thereon at any time, and had also let him deal unsupervised with checks on the bank presented day by day in envelopes received at the bank from the clearing house or from certain banks not acting through that institution. Earl had habitually accepted as correct the total amounts called for from the bank in settlement by the slips received with each envelope and presented to him by Coleman as correct, without himself verifying the slips by the checks in the envelope before Coleman could remove therefrom and suppress his own fraudulently drawn checks. Earl had kept the cashier's ledger according to said slips; and had made the remittances called for by them as if correct in amount, with no attempt at any time to see for himself whether they were in fact correct or not. To the routine thus established Coleman had adapted his methods of depredation and concealment, and to its deficiencies their success was due. There is little or no controversy as to the material facts regarding these matters.

The master and the District Court agree in finding none of the defendants liable for losses to the bank by Coleman's thefts before September 30, 1907. The amount he had taken before that date appears to have been about $27,000 in all. The sums making up this amount having been taken while he was teller as well as bookkeeper, it is far more probable, as the court finds, that he took them, as a rule, out of the cash coming into the bank, than by resort to his other method, i. e., that of procuring the drawing of a check to his own order, to be included in the clearing house or other envelope received at the bank, abstracted by him before it could come under the cashier's eye, and wrongfully charged up by him on the depositors' ledger, as more fully explained in the court's opinion. What he took in cash he concealed, for the most part, by falsely charging the amount taken to the account of some depositor on said ledger, so as to leave the apparent total due all depositors, according to that book, in agreement with the total appearing from the cashier's ledger, which total however was always less than the true amount by the amount of his stealings.

That it was not due to any negligence chargeable to the defendant directors that Coleman was enabled to put his method of stealing into operation and to keep it from being detected up to the end of September, 1907, may now be taken as established. If the bank's losses thereby, prior to that time, can be attributed to negligence on the part of any official connected with the bank, Earl, its cashier throughout said period, is the only official so negligent. As to Earl, the court said in its opinion:—

"Possessed of his knowledge and intelligence, it would seem that if he had exercised the slightest care in supervising Coleman in the handling of the clearing-house checks and in the keeping of the depositors' ledger, the greater portion of the defalcation never would have taken place."

But the court, here agreeing with the master, expressly declined to find the bank's directors negligent in employing Earl originally, as they had done in 1903; and it nowhere overruled or disturbed findings by the master that they had not been negligent in retaining

him in office. The court regarded the question whether or not they were so negligent as of little importance in view of the findings made by it.

As to Edwin Dresser, the bank's president and executive head, he appears without dispute to have taken, throughout the period in question and for many years before, a part in its daily operations not taken by any other director, which brought him much more closely than any of them into connection with said operations, and afforded him constant opportunities, not possessed by them, for observing the methods followed in conducting said operations and the manner in which the various employees were performing their duties.

It is undisputed that he had regularly been at the bank every morning for an hour or two, to consider with the cashier questions relating to investment of the bank's funds, and again for an hour or so every afternoon, to ascertain what had gone on during the day; that he had been accustomed to deal personally with matters such as shortages of tellers' cash, or their discharge when found by him incompetent or careless; and to sign at times checks for balances due the clearing house or the First National Bank of Boston, instead of the cashier.

It is also undisputed that he was one of the largest stockholders of the bank, and one of the largest depositors therein; that his personal deposit account ran from $35,000 to $50,000 all the time, and was an inactive one; also that he was president and principal owner of a company which was also a large depositor. In filling vacancies on the board of directors his influence appears to have been controlling.

To the extent above stated, he had, with the acquiescence of the other directors, exercised immediate supervision over matters connected with the administration of the bank, to which they had given consideration only when brought before them at their regular weekly meetings.

The negligence of the defendant directors because of which the court has found them liable, is, therefore, not any failure in duty on their part before September 30, 1907. It consists wholly in their failure, on or after that date, to discover that Coleman was practicing his method of stealing the bank's funds and was so manipulating the entries on its depositors' ledger from time to time, as to prevent their showing what he had done or was doing, except by resort to a more thorough and searching examination and checking of said entries than any which had ordinarily been made by the directors. By said method, as is undisputed, he successfully concealed his thefts, not only from the cashier, but also from the National Bank examiners at their semi-annual examinations of the bank and its books. Two such examinations were made during the above period before September 30, 1907, viz.: in December, 1906, and June, 1907; and five after that date, viz.: in December, 1907, June and December, 1908, June and December, 1909. These examinations were made alternately by two different examiners.

The appellants contend that the evidence did not warrant the

court in treating the master's finding that the charge of negligence on their part was not sustained by the evidence, as either clearly against the weight of evidence or as so inconsistent with his other findings that it could not properly stand.

If negligence, as above appears, is not chargeable to the directors in respect of any of Coleman's stealings before September 30, 1907, it follows that they cannot be held responsible merely because of the deficiencies permitted by Earl to exist in the methods or routine followed in conducting the bank's regular operations or in recording them on its books, notwithstanding that it was by taking advantage of such deficiencies that Coleman was enabled to accomplish and conceal his stealings. They were entitled to rely, as they did, upon Earl to guard against any such deficiencies, and until some special necessity for such action was brought to their attention, they were under no duty to inquire or interfere independently of him. Briggs v. Spaulding, 141 U. S., 132, 165, 166; Warner v. Pennoyer, 91 F. R., 587, 590, 591.

The negligence of which the court has found the directors guilty on September 30, 1907, does not consist in the neglect of any special necessity for investigation then brought to their attention, but in failure to make such examination of the bank's books as in the opinion of the court their regular duties required them to make.

The court found that if they had then made such an examination Art. 19 of the bank's by-laws required, they would have compared the bank's liabilities, as shown on the depositors' ledger, with the cashier's ledger (on which alone they had been accustomed to rely), in order to ascertain whether the bank's books were being correctly kept; that such comparison required them to add the balance footings or the balance columns as then found on the depositor's ledger, those totals either did not appear therefrom at all, or appeared incorrectly; that if the true total of the balance footings had then been so ascertained, the fact that it was $20,000 larger than the sum the depositors on the cashier's ledger would have been disclosed, and if the true total of the balance columns had been so ascertained, the fact that it was $27,000 larger than the amount shown due depositors on the cashier's ledger would likewise have been disclosed; that if they had added only the balance footings and compared the total with the cashier's ledger, they would have ascertained Coleman's irregularities; and that not having done so they were chargeable with negligence and liable for his defalcations after that date. Discovery of the fact that the bank really owed its depositors $7,000, or even $20,000, more than its cashier's ledger showed on the date referred to, would no doubt have led to an ascertainment by the directors of Coleman's irregularities, as the court found. After such a discovery the directors could not, without unquestionable negligence, have omitted an immediate and thorough audit of the bank's books and accounts, going to the extent necessary for a full and complete explanation of the discrepancies found and the causes thereof.

The only ground for holding such examination necessary on the particular date of September 30, 1907, is that the directors then de-

clared the regular dividend, payable October 1, 1907. Dividends were regularly declared as of April 1 and October 1, and there were four later dividend declarations: on March 23 and September 28, 1908; March 30 and September 27, 1909. For the examinations required as above by Art. 19 no dates were expressly fixed by the by-laws or otherwise, but the court found that they "were intended to take place before the dividends were declared." Of the two examinations appearing from the records, however, only the second (March 30, 1909) was made on or just before the date of the dividend declaration; the first (November 16, 1908) came six weeks after the October, 1908, dividend.

Art. 19 of the bank's by-laws, quoted in the opinion below, provided that a committee should be appointed by the directors every six months,—

"To examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept and the condition of the bank in a sound and solvent condition, the result of which examination shall be reported to the board at their next regular meeting."

Art. 16 required the keeping of a minute book, in which the proceedings of the board at all regular and special sessions were to be recorded.

The directors' records show only two examinations by them during the period here in question. In neither instance do they expressly show the appointment of a committee to examine. They show only that, on November 16, 1908, the directors examined the bank and found the cash balance correct. This record is attested by Edwin Dresser, Gale and Barber, as directors. They also show that on March 30, 1909, a special meeting of the directors was held for the purpose of examining the bank, the president presiding; members present: Gale, S. Dresser and Barber.

Although the records show no other examinations, the master found from the evidence that others were in fact made by the directors as a board. When, or by whom, said other examinations were made, the master did not find, there being no evidence before him sufficient for the purpose.

As to such examinations as were made, whether by committees or by the board itself, the master's finding is undisputed that they were never carried to the extent of examining the individual (i. e. depositors') ledger, and comparing it with the general (i. e. cashier's) ledger.

The court found that no examinations except the two shown by the records, as above, were made in 1907, 1908 or 1909. Whether or not this was a finding clearly required by the weight of the evidence, we need not consider. No directors' examination, whenever or however made, having before extended to such verification of the figures found on the depositors' ledger as, in the view of the court, was necessary to an adequate performance of the directors' duties, it results that the real inquiry is, whether their failure to make the kind of examinations and comparisons deemed necessary

y the court on September 30, 1907, was a failure in duty on their art so clearly negligent as to warrant the court in rejecting the aster's findings, and to render the directors all responsible for the bsequent losses by Coleman's stealings. If not so liable as of that te, it is plain that they are not so liable for the subsequent failures make like examinations before each dividend subsequently de-ared.

To hold all the directors chargeable with negligence rendering em all so responsible, merely because they failed to make the ldditions and comparisons held necessary by the court, requires, in r opinion, the application of a standard of diligence more exacting an any heretofore applied in the case of National bank directors; r can we regard the application of such rule as justified by the reumstances here shown.

We do not think it can be said that there would necessarily have en a negligent breach of duty on the part of every director had aminations in accordance with Art. 19 of the by-laws been wholly itted during the period here involved, no special reason tending forbid such omission being shown.

The by-laws were adopted by the then directors when the bank s organized in 1865. They were not adopted by the corporation, r were their requirements imposed upon the directors by any au-rity higher than that of the board itself for the time being. ey were adopted before the amendments of 1874 to the National nking Act, which permitted the directors to allow incidental pow-necessary to carry on the bank's business, to be exercised by cers or agents; as was also the case in Briggs v. Spaulding, 141 S., 132. We see no reason to doubt that the requirements of . 19 might have been waived or their observance omitted by the ectors, if regarded by them as no longer necessary, in the absence special circumstances showing such waiver or omission to have n inconsistent with good judgment and reasonable prudence. n-observance of a similar by-law for fourteen years appeared in above case of Briggs v. Spaulding, the matters covered by it ing been left by the directors wholly to the president and cashier, without any formal amendment or repeal of the by-law. The ectors were nevertheless exonerated, although stringent observ-e of the by-law could hardly have failed to disclose the misdoings he president and cashier for which it was sought to hold them onsible. It was considered sufficient by the court that the man-of conducting the bank's business, in that and other respects, been sanctioned by long-continued usage.

the present case the court treated Art. 19 of the by-laws as evi-e in the nature of an admission by the directors as to what they idered themselves called upon to do in the performance of their es. They had indeed left the by-law unrepealed, and the testi-y of one of them (Sumner Dresser) was, that the usual times making examinations of some sort had been March and Septem-. But no committee to examine had ever been appointed as d for by the by-law; such examinations as were made were by he directors who happened to be present; and no such verifica-

tion of balances on the general ledger by verification of the figures on the depositors' ledger had ever been contemplated or recognized as a required feature of the examinations to be made. The by-law does not expressly require that method of verification; it leaves the choice of methods to the examiners. Taking it and the directors' practice under it together, we cannot regard them as clear and unmistakable evidence that the directors had considered themselves called upon to follow the process thought necessary by the court in making their examinations.

Nor can we find negligence on the directors' part clearly and unmistakably shown merely by the fact that they omitted to make the examination in the particular way which the District Court regarded as a necessary test required by ordinary considerations of precaution. It is difficult to see upon what principle a director can be held negligent merely for omission to perform an act not usual and not known by him to be necessary or important, especially in the absence of anything suggesting inquiry as to its necessity or importance. What was regularly done at the examinations made appears from the quotation in the opinion below from the master's report; and it proved insufficient for the purpose of bringing to light that which would have led to discovery of Coleman's practices in that, as the opinion below states,—

"They took the amount due depositors upon the cashier's ledger as correct which was, in fact, inaccurate by the amount of Coleman's stealing."

Speaking generally of the directors, there had been nothing to put them on inquiry or cause them to suspect that the amount shown by the cashier's ledger as due depositors might be inaccurate, and might therefore require verification by such additions of figures on the depositors' ledger, and we cannot hold their reliance upon the cashier and his ledger for a correct showing of said amount to have been clear and unmistakable negligence. The amount so taken by them as correct, as the master found,—

"would be and apparently was verified by (the cashier's) showing of expenses paid, investments made, cash on hand and deposited with other banks."

As, in view of Briggs v. Spaulding, 141 U. S., 132, above cited, we could not hold mere non-observance of the by-law to be a proved failure in performance of a duty required of the defendants as directors, so we cannot hold the above failure on their part to go behind the figures given them by the cashier on his ledger, of itself to be a proved negligent failure in due performance of their duties. Such action on their part would have been a "measure of unusual precaution, not imperative when there was no reason to distrust the integrity or efficiency of the cashier"; and directors, as has been held, are "not to be deemed remiss because they did not resort to exceptional methods, or because they relied on the cashier's supervision over the books and accounts, or because they reposed confi-

dence in his reports of the amount and other clerical details of the assets and liabilities." Warner v. Pennoyer, 91 F. R., 587, 591.

Neither the master nor the court below have found, nor does anything in the record indicate, that on or before September 30, 1907, there had come to the notice of the president or of any other director anything tending to arouse in their minds any suspicion or distrust of the cashier's efficiency, or of the reliability of the books and accounts kept under his supervision.

In view of the subtlety of the wrongdoer's system for covering and concealing his speculations and embezzlements, we are also unable to accept as clearly warranted by the evidence the conclusion reached by the District Court that due diligence on the directors' part in comparing the bank's assets and liabilities with the cashier's ledger would have resulted in discovery by them of the discrepancies found by the court to have existed on that date between it and the cashier's ledger.

Coleman's manipulations of the depositors' ledger succeeded in concealing his methods from the National Bank examiners, as stated below. But the court had before it the results of six months' scrutiny of both ledgers by an expert accountant, who had also examined in connection with them everything found in the bank's books and papers which could assist him in tracing Coleman's dealings with the depositors' ledger in his constant efforts to prevent the entries thereon from showing the shortages caused by his thefts. By the aid of these results the importance of determining the true amount of the columns and footings in the depositors' ledger referred to by the court, and how to select and follow the significant columns and footings in order to accomplish such determination had then been made clear. But we are not satisfied under the peculiar circumstances of the concealment that it is reasonable to find, or to assume as clearly and unmistakably established, that the directors, acting as they would have had to act on September 30, 1907, without the aid of any of the knowledge obtained after the event and not prompted to exceptional methods of investigation by any reason to believe them necessary, would have discovered for themselves the important thing to be done and accomplished it with success. We agree with the master that the depositors' ledger—

"is a difficult book to follow and one in which a person not thoroughly familiar with it and used to handling it would not be likely to readily detect error."

If it can be said that Edwin Dresser, the president, though neither an accountant or bookkeeper, nor familiar with banking methods of keeping either individual or general accounts, had, or should have had, sufficient familiarity with this particular book because of his long-continued daily opportunities for becoming familiar with the method of bookkeeping followed in his bank, we find no sufficient ground for supposing sufficient familiarity or bookkeeping knowledge to that end on the part of any of the other four directors. Richardson, it is true, had been for years paying teller in a Boston Trust Company, a fact which we can hardly regard as sufficient for

the purpose in his case, there being nothing to show that he had ever had to deal with such a book as this. The occupations of the remaining directors still less appear to have been such as would have been likely to qualify them in any respect for such an inquiry.

A further consideration seems to us important in this connection. Coleman not infrequently resorted to methods for concealing the fact that the entries on the depositors' ledger did not really correspond with the cashier's ledger, as they were supposed to do, other than that method which might have been detected by addition of his balance footings or balance columns. He adapted his methods of concealment to the varying danger of detection as it appeared from time to time. In particular, he had on many days so raised or lowered the amounts shown as balances due individual depositors as to leave a correct addition of the footings or columns in agreement with the cashier's ledger and to require ascertainment of the true balances due depositors in order to detect the shortage. To this method he appears to have resorted when any examination by others of his depositors' ledger seemed likely to be impending. By resort to it he succeeded in preventing discovery by the National Bank examiners at any of their examinations,—in one instance (December, 1909) while their examination was proceeding and detection had appeared inevitable. It cannot, therefore, be assumed as certain that the entries now found on the depositors' ledger as of September 30, 1907, would have been found there as they now stand had the method of examination suggested by the court been undertaken by the directors on that date. Nothing then known to the directors tended to suggest to them the importance of making their examination without Coleman's knowledge.

If any examination of the bank by the National examiners has since been made to appear in any respect inadequate, in the light of the discoveries made as above by the expert accountant, each of them appears to have been at any rate much more thorough-going than any of the directors could have been expected to make without expert assistance. That such examinations were regularly made twice in each year, and without discovering anything wrong in the bank's condition or bookkeeping, the directors knew, and that fact affords still another reason for believing that they were going along under a feeling of security, and with no cause to suspect wrong doing or irregularities; a reason which tends to forbid the conclusion that the directors are shown to have clearly and unmistakably failed in the ordinary care due from them, merely by their omission as above to make more regular and more searching examinations themselves.

Nothing in the evidence tends to show that examinations of the kind held necessary by the court are or have ever been usually recognized or understood as part of the regular duties which directors of such a bank as this are expected to perform, nor is any such duty required by any rule of law. Judging these directors, as they are entitled to be judged in the light of all the circumstances present to their minds at the time, as business men of average business abilities and accomplishments, with no pretensions to instinctive foresight, or expert training in respect to bank bookkeeping, we are

unable to believe that their omission to make such examinations on September 30, 1907, or thereafter, in the absence of notice of special necessity therefor, clearly proves negligence on their part. To this extent we think the master's findings should have been confirmed. Under a familiar principle, in determining the question whether the evidence was so clear as to justify rejecting the master's findings against negligence, reference must be had to the situation which surrounded the directors at the time of the alleged omissions of duty, and before the wrongs of Coleman had been discovered and exposed, rather than by reference to a situation afterwards discovered and exposed by experts. (Thompson on Law of Negligence, 1, s. 28.) The character of after-discovered conditions might be such, in a given case, as to tend to show negligence, yet fall far short of making it clear and unmistakable; and, again, they might be such as to have very little, if any, tendency to show negligence.

3. Thinking, as we do, that there was no want of due care in the discharge of the directors' duties clearly established by their failures to make the above examinations of the depositors' ledger thought necessary by the court, the matter next in order of time to be considered is the court's finding that there was such a failure in due care on Edwin Dresser's part, in neglecting to bring before the other directors Fillmore's letter to him dated September 29, 1908, or Fillmore's statements and warning to him regarding Coleman in a conversation near the end of October, 1908; and in failing to take any action whatever in consequence thereof toward investigating Coleman's life outside the bank, or his doings within it, as to render him individually liable. The substance of Fillmore's letter and of what he later said to Dresser appears in the District Court's opinion.

Fillmore was a resident of Cambridge, and a responsible person so far as appears. As a depositor in the bank he had an interest with whose protection Dresser was charged, so far as reasonable diligence in performing the duties of president and a director could secure it. Whether or not Fillmore's claim had any justification that his package of money left in the bank's safe had been taken by someone in the bank, his statement that he believed Coleman was "living a pretty fast pace," his statement that he "had good authority for believing that Coleman was supporting a woman," and his advice to Dresser, "look after Coleman," seem to us, as they did to the District Court, notice to Dresser calling for immediate action on his part, such as he could disregard only at his peril.

At the time of these warnings Coleman had in fact been speculating for nearly a year through Boston brokers, having begun such speculations about the time he began taking the bank's money in November, 1906; and he thereafter, in fact, continued them until February, 1910, in which month his stealings were discovered.

He had also, during the same period, in fact, been spending money freely in Boston hotels and restaurants, and generally leading a fast life, as the court's opinion states.

He does not appear to have taken any pains to conceal either his speculations or his other doings in Boston outside bank hours. They had been going on long enough to prevent any reasonable doubt

that prompt and appropriate inquiry in the proper quarters woul
have shown that Fillmore's statements and warning had amp
foundation in fact. Had the other directors been informed of then
the duty of the board would have been to inquire at once as to the
truth, and having learned that there was a substantial basis for then
their duty to end Coleman's connection with the bank and institu
an immediate and searching scrutiny of all his doings therein woul
have been plain.

It cannot be said that there was nothing regarding Coleman withi
Dresser's knowledge at the time which should have led a ban
president in his position to suspect that there might be truth enoug
to need investigation in what Fillmore had said, or should have le
him to apprehend danger in wholly disregarding and neglecting i

The bank never paid Coleman more than twelve dollars a week
yet since 1907 he had been running an automobile which cost $80
even coming to his work in it and leaving it standing in front o
the bank. We cannot doubt that Dresser knew the fact that Col
man was using the machine as its owner, because this was a fac
generally known to the other persons daily present at the bank. I
there is evidence that Coleman paid for the machine out of com
missions on sales of other machines negotiated by him, it does no
appear that Dresser knew, or ever asked, how he had paid for it
Here was a piece of apparent extravagance on the part of a twelve
dollar-a-week clerk, trusted to perform important duties in the bank
and not long before entrusted with the bank's money, which w
think should have suggested at once to the bank's president, takin
the part which Dresser is shown to have taken in the daily adminis
tration of the bank's affairs, and relied upon as he was by the othe
directors particularly in matters concerning the hire and discharg
of employees,—the need for active investigation. It should hav
aroused his suspicion, as it did later the suspicions of persons uncon
nected with the bank's management, one of whom remarked upo
it to Dresser himself in February, 1909, and another to Earl i
August, 1909; remarks which Earl reported to Dresser. Dresser
however, took no action in consequence of these remarks, any mor
than when Coleman first appeared as owner of an automobile, o
when he received Fillmore's statements and warnings.

There was evidence that before the fall of 1908, and in fact eve
since 1904, it had been Coleman's frequent practice to give order
to brokers for the purchase or sale of stocks, over a telephone in th
bank within a few feet of the cashier's desk and in the next room
to that occupied by Dresser when present at the bank. There wa
also evidence that Coleman had talked on more than one occasion
with Dresser about stocks. That he once spoke about a purchase
or sale of copper stocks intended by him, Dresser admitted, in
testimony given before the master. The date of this last occurrence
did not appear; but if Dresser is to be credited with entire ignorance
in the fall of 1908, that Coleman was interested in the stock market,
he must be supposed to have paid no attention whatever to what
went on in his immediate presence.

If what had been brought to Dresser's notice about Coleman's

automobile, and his dealings in stocks, would not of itself have been enough to call upon him for active inquiry and investigation, we think it clear that after Fillmore's statements, tending to confirm an apprehension of danger to the bank which facts already within his notice tended to suggest, he could no longer remain inactive and still be entitled to say that he was doing his full duty.

Under a familiar rule, in view of Dresser's relations to the bank and the other directors, it was his plain duty not only to know the character and habits of the bank's employees and exercise reasonable supervision over them, but to use reasonable diligence in respect to all matters bearing upon the question whether they should be retained in positions of trust.

Notice sufficient to attract attention, and put a party on his guard and call for inquiry is notice of everything to which such inquiry might have led. Wood v. Carpenter, 101 U. S. 135, 141; Shauer v. Allerton, 151 U. S. 607, 622.

So far as appears, Dresser had neither known nor tried to know anything about Coleman's course of life when away from the bank. According to his testimony, he knew Coleman's father, a respectable man, and Coleman had been "highly recommended" when first employed in the bank in 1903. Besides this, Coleman's behavior while actually in the bank appears to have been all the material he ever had upon which to form a judgment as to his trustworthiness. The recommendation in 1903 appears to have come only from the commercial school in which Coleman had just taken a course. He was then only seventeen years old, and he was then taken into the bank only as messenger at four dollars a week. There was clearly nothing in all this to excuse blind confidence on Dresser's part in his fidelity, five years later, when being trusted in positions affording greatly enlarged opportunities for stealing; or complete disregard of charges seriously made, and in substantial respects supported by facts within Dresser's own knowledge at the time, that Coleman was following a course of life so likely to put him under temptations to dishonesty.

The correctness of Coleman's entries on the depositors' ledger might have been tested by Dresser more readily than by any of the other directors. Means for detecting errors in them were more constantly and more readily available to him than to them, because of his daily presence in the bank as its executive head, and the fact that his own personal deposit account and that of the company controlled and managed by him were two of the largest on the bank's books. They were the two more frequently manipulated by Coleman than any others on the depositors' ledger, when it suited his scheme of concealment to charge the sum taken by him to an individual account as if drawn by the depositor, or to drop an individual depositor's apparent balance without entering any charge to justify the drop.

Although Dresser kept no check book showing by its stubs what checks had been drawn, he had data enabling him to tell at any time how much ought to be standing to his credit on the bank's books; and the occasions were numerous and common upon which

any examination of either account as shown on Coleman's ledger must have shown him gross error in the balance there appearing. Examination enough for this purpose he might have made at any time in a few minutes, on his own statement. He never attempted anything of the kind, but remained content with the monthly showing of his pass books, which Coleman took care to have always correct. In Dresser's testimony he admitted that he knew the way the depositors' ledger was kept, and had occasionally looked it over; but he never had done so to see whether it was correctly kept.

Examinations of Coleman's figures as above by Dresser in October and November, 1908, would have compelled further investigation, and such investigation, properly conducted, would have shown Dresser that what he had been told about Coleman's speculative habits and fast life was true. If, with this knowledge, he had let Coleman continue in the bank as before, without full inquiry into all his previous dealings with its funds or books, Dresser would have failed in his duty towards the depositors, and would thereby have become liable for subsequent losses of its money through Coleman's continued dishonesty. Preston v. Prather, 137 U. S. 610.

Moreover, and by way of illustration, it appeared from Coleman's testimony in the trial of this cause before the master that during this period he was engaged in faro bank gambling in New York, and we think it quite within the realm of probabilities that if reasonable circumspection had been exercised and reasonable inquiries and investigations made as to his habits and doings, that his frequent journeys to New York on the afternoon trains, returning in the morning, and the stupendous losses at faro would have been uncovered and the bank's money saved. It is true that the frequency of these journeys and the extent of the losses were not disclosed until the trial of Keliher (193 Fed., 8, 12, 16—18), who was associated with Coleman in these swindlings and gamblings, but it appearing in this litigation that these doings were at a period closely connected with the time of the disclosures to Edwin Dresser as to Coleman's habits, we think it is something which we may consider on the question as to what reasonable circumspection and investigation on Mr. Dresser's part would probably have discovered at a time to save the bank.

In view of Dresser's position as president, of all his previous knowledge regarding Coleman, and of all that due use of means constantly at his command would have afforded him, we are unable to find reasonable excuse for his total disregard of what Fillmore had said to him. We cannot avoid the conclusion that reasonable diligence in discharging the duties of his office required him to report what Fillmore had said to the directors and to see that steps were taken without delay to find out how far those statements were founded on fact. For his failure to take any action of the kind no excuse is shown.

It is true that Dresser was receiving no compensation for what he did, either as president or as director. It is true also that the duties he alone had been accustomed to discharge in connection with the bank's management had never been expressly delegated to him.

He had, however, assumed their performance, and continued to perform them for many years, and the other directors, by acquiescence, had been relying on him for their proper performance. We think it unmistakably clear that failure by him to use reasonable care in performing them, after a warning about which the other directors knew nothing, imposes upon him a responsibility not incurred by them, and not imputable to them in such a sense as to make them liable for the resulting consequences.

Because of his failure to take any steps himself regarding what Fillmore had told him, and because of his failure to inform the directors, thus affording them an opportunity of then putting a stop to Coleman's frauds, we are of opinion that the responsibility for losses due to their further continuance must rest upon him. If, as we think, the opportunity of then arresting the course of Coleman's depredations was lost by Dresser's neglect, what the bank lost by their continuance was lost through his neglect. We therefore find no error in the District Court's conclusion to this effect.

4. Next to be considered is the District Court's finding that not only Edwin Dresser, but all five directors are liable for the total amount taken by Coleman after the end of September, 1909. Up to that time he had taken $130,193 in all; afterwards he took $179,950 more.

It appears without dispute that a decline in the total amounts due depositors, as shown by the cashier's ledger and his statements presented each week to the directors, began to show itself in September, 1909, that it later became more rapid and more serious in amount than at first, and that this continued until the failure. It was noticed by the cashier and the directors and led them to discuss its proable cause, to go over the cashier's ledger in search of possible errors, and to count the cash and securities. The only result of the consideration they gave to the matter was a conclusion accepted by them all, that the decline must be due to general business conditions and to competition of newer institutions offering greater attractions to depositors. With this they remained content, taking no steps to find other explanations for the shrinkage, either by having an audit of the bank, or an examination of the depositors' ledger, or a scrutiny of the checks and clearing-house slips, kept in the bank each month until the pass books were balanced at the end thereof.

The court held that reasonable care on the directors' part required them, in September, 1909, when they knew the shrinkage in deposits to be abnormal, to cause an audit to be made, or at least an examination of the checks then in the bank, in addition to such examination of the depositors' ledger as it had held necessary to be made by them twice a year, as above, beginning with September, 1907, and therefore also in September, 1909. Resort to these measures, as the court found, would have revealed Coleman's defalcations; a reasonable time for such examination and discovery had expired at the end of September, 1909; and the directors' liability for all the subsequent losses was therefore held established.

There had in fact been no real falling off, either in the number of depositors or in the average daily amounts then being deposited.

This was apparent from the cashier's ledger, which correctly set forth the amount of each day's deposits. The total amount which ought to have been in the bank to the credit of the depositors was over $400,000. The previous normal average of total deposits had been about $300,000, rising above or falling below that figure by about $25,000. Coleman's takings, at first comparatively small in amount, had not for some time offset the actual increase in deposits; and his methods of concealing them had meanwhile prevented their effect in reducing the totals due depositors from becoming noticeable in the showings of the cashier's ledger. But, having by the fall of 1909 come to offset said increase, and becoming thereafter larger in amount and more frequent, the reduction they were effecting necessarily began to be disclosed by said ledger, and it rapidly became more and more apparent therefrom.

We do not think the directors can fairly be charged with knowledge that the shrinkage in deposits was "abnormal" at so early a date as that adopted by the court in the above findings.

In the opinion, the highest and lowest totals of deposits for 1907 and 1908 and for each month of 1909 are set forth. These figures do not show any shrinkage which the directors must have regarded as abnormal before the last ten days of October, 1909, at the earliest. They support the testimony of Sumner Dresser, that the normal average for several years had been taken to be about $300,000, sometimes $325,000 for a high, and $275,000 for a low normal. The lowest total in 1909 before September 1 had appeared on June 29, and was a little over $271,000. But during the following three months it had reached $345,000 in August, and been over $300,000 for a considerable part of the time. Not until September 29 did it fall again, as it had in June, to about $271,000. After September 29, while $300,000 was never again reached, totals of $280,000 or over were shown for much of the time. The lowest in October was $255,878 on the 23d, from which time the decline appears to have been rapid and steady, less than $200,000 being shown on December 18, only about $107,000 when the bank closed its doors.

The master found the time when a decline was noticed and considered by the directors to have been "in September or the early fall of 1909." Sumner Dresser's testimony that it was "about the last of October" was not contradicted, and, in view of the figures seems to fix a time more in accordance with probability. The date fixed by the court as that whereon a reasonable time for taking the measures held necessary in view of the shrinkage expired, seems to us in any event at least a month earlier than the evidence warrants.

From our conclusion that Edwin Dresser's negligence in disregarding Fillmore's statements about Coleman had made him responsible for the failure to discover and stop the stealings ever since the end of November, 1908, it follows that he, at least, is also responsible for the failure to discover and stop them when the above apparent abnormal shrinkage in deposits was under consideration by the directors. To him alone had come notice of facts which ought to have led him to suspect the need of complete investigation as to Coleman's doings in the bank; and it had ever since been in his power to use

ose methods of inquiry which, as above stated, were more readily
id constantly available to him than to any other director. Here
as additional reason brought to his notice in September, 1909, for
spicion that something wrong might be going on within the bank,
id a reason which should have had especial force with him because
f the notice received by him months before, but never imparted to
is fellow directors.

As to the other four directors, to whom no such notice had come,
1908 or subsequently, as had come to the president,—the ques-
on is whether or not the evidence clearly shows their omission to
ke, in the fall of 1909, the measures held then necessary by the
istrict Court because of the apparent drop in deposits, to have been
failure in reasonable care on their part.

We agree with the District Court that if such measures had then
en taken, they would have revealed Coleman's defalcations. Not
ly is it true that verification of the totals on the depositors' ledger
uld have revealed much larger and more frequent discrepancies
on comparison with the cashier's ledger than at the end of Sep-
nber, 1907, but it is also true that from the checks in the bank
ring September, October and November, 1909, and particularly
m those of the last two of said months, there would have been
nd missing so many checks and for so large amounts, as must
ve shown the immediate road toward complete discovery. The
ssing checks represented Coleman's stealings during the month:
y had been included in the bank's payments in settlement with
clearing house or with other banks, and they ought to have been
the bank's custody. Neither on the days upon which they had
n paid nor on any subsequent day had they been charged upon
depositors' ledger, but to discover that this was true would have
n much more difficult than to discover that they were missing.

We further agree with the District Court that the drop in deposits,
apparent from the cashier's ledger, called for investigation as
withdrawals from the money on deposit, rather than as to any
posed falling off in number of depositors or in amounts deposited.
ile the apparent shrinkage did not necessarily indicate that the
k's funds were being stolen, it did indicate that money was being
hdrawn at a rate faster than that at which it was being entrusted
the bank's care; and that this was happening to an unprecedented
ent.

But the evidence by no means shows that inquiry as to with-
wals of deposits was wholly neglected, or that the directors' adop-
of a mistaken explanation as accounting for the shrinkage was
gether without excuse. They were told by the cashier that the
positors were drawing out their money. He specified several large
unts from which considerable withdrawals had recently been
le. They were also told by the teller that while no account was
ng lost, the accounts were being largely reduced by the depositors
nselves. That all this did not go far enough to account for all
shrinkage is true, yet we do not see how the directors, other than
vin Dresser, could reasonably have been expected to find out of
nselves that it was true, and in view of the rule that the conclu-

sion of negligence must be clearly and unmistakably established in order to reject the findings of the master, we cannot find warrant for sustaining the finding of the District Court that they were so far culpable as to make them chargeable with individual liability upon the ground of negligence in failing to do more than they did.

The measures which would have led to discovery of the truth about the shrinkage, had they been taken at the time, appear simple and obvious, now that all the facts then existing have been brought to light. It is true, also, that such discovery, when made in the following February, was effected by means of those measures, and at a cost of comparatively little time or labor.

It is so effected, however, not by persons without special skill or knowledge, but by the president and treasurer of a different bank examining the accounts of this bank with a view to its purchase. Both were possessed of a knowledge of banking methods of accounting, and an experience in dealing with accounts of that character, such as these directors neither had nor were expected to have, so far as appears. In view of all that can be supposed to have been present to their minds at the time, it seems to us more than can reasonably be expected of them that they should either make the same discovery for themselves, or give the cashier such directions as would have enabled him to make it; at least, under the circumstances, we think the omission to do more falls far short of affording the measure of proof required to justify clearly and unmistakably, and contrary to the findings of a master, a conclusion of negligence and individual liability on the part of directors for the wrong-doing of clerks or subordinate officers of banks to whom duties have been entrusted.

No complete audit of the bank had been made since the summer of 1903, just before Earl assumed his duties as its cashier. The only effectual step which these directors could have taken toward finding the true reasons for the shrinkage noticed in the fall of 1909, would have been to order another complete audit made by competent experts.

We cannot regard it as clearly shown, however, that their failure to take this course was a negligent failure in the reasonable care required of them. No such action was recommended or even suggested by the cashier or by the president; nor is any sufficient ground found for the conclusion that the directors ought then to have known that they could no longer safely rely upon the cashier, or his methods, or his representations regarding the bank's condition, but were called upon to take action independently of him. Except the drop in deposit totals, which he accounted for as above, nothing appears to have been brought to their notice in the fall of 1909, any more than in September, 1907, tending to suggest a necessity for such action on their part.

It is true that the auditor's report of 1903 had called attention to the danger of letting the depositors' ledger "go a day with errors not found." Not only the president, but Sumner Dresser and Gale also, must be supposed to have known this fact when the report was made. The other two defendants were not directors at that time.

ut to keep this book free from error was part of the cashier's work, id the responsibility for having it so kept was upon him, and until me failure on his part in that respect had been brought to their otice, the directors might reasonably assume that this part of his ork was being properly done, without giving it their personal pervision.

On December 3, 1909, the next examination of the bank by a Na- nal examiner was made. By that time the deposit totals had rther declined to $151,506.30, a decline since the June examina- n which must have attracted the examiner's notice. Yet neither his report, nor to the directors, did he suggest that anything had en found by him requiring correction or investigation, in the nk's condition at that time. Though they knew that his exam- ation was by no means a complete audit, the circumstance that had found nothing wrong might justly tend to confirm the di- tors in their reliance upon the cashier.

5. The defendant Barber has been found negligent by the Dis- t Court in that he paid no attention to certain statements made him, about three months before the bank failed, by the president the Harvard Trust Company, in an interview at which they ked about the proposed purchase of the bank. The statements e in substance, that it had been currently reported among Bul- l's clerks that one of the bank's officers was frequenting bucket ps in Boston and was evidently living pretty fast. No name was ntioned; Barber did not ask the name, never reported the state- nt to the other directors, and took no steps to investigate as to r truth.

arber, so far as appears, had at the time no other reason for pecting that Coleman might be the person intended, except that ng the preceding summer a Dr. Wetherbee, living near the k, had told him "he did not think it looked very well to have automobile in front of the bank so much." Barber's testimony, n in person before the master, was that Bullard's statements di- d his mind not to Coleman (who was only the bookkeeper), but he officers of the bank. This seems to us the impression most y to be given by what Bullard said. He did not suggest any f of his own that the reports he referred to were true, or even they called for action on Barber's part. In view of Barber's nony, we cannot consider it proved that they constituted a warn- against Coleman which Barber could not neglect without be- ng responsible.

arious other questions are raised by the assignments of error, h the conclusions above stated render it unnecessary to decide. he decree of the District Court, except as against Edwin Dresser's nistrator, is reversed. The case is remanded to that court, directions to dismiss the bill as against the other defendants, o modify the decree against said administrator by reducing the ges awarded to the amount of Coleman's defalcations from nber 1, 1908, to the close of the bank. So modified, said decree rmed. The appellants recover their costs of appeal.

BROWN, *J.* (dissenting in part.) While I fully agree with the careful opinion of the majority of the court as to the defendants other than the administrator of Edwin Dresser, I am unable to agree with a finding that by reason of special negligence on the part of Edwin Dresser his estate should be held responsible in damages to the full amount of Coleman's defalcations from December 1, 1908, to the close of the bank.

I am especially of the opinion that what may be termed the "Fillmore warning" has been given undue and artificial importance as a notice putting Edwin Dresser on guard against Coleman as an untrustworthy person, whose conduct should have been brought to the attention of the other directors and made a subject of investigation.

The special master, experienced in judicial work, had before him the witnesses in person, and upon this matter, depending so much upon oral testimony and upon the circumstances under which Fillmore's statement was made, found no negligence. I am of the opinion that this finding of the master should stand.

The testimony of Mr. Wellington Fillmore, who was a depositor in the bank up to the time that it closed its doors, is chiefly relied upon as a direct warning to Dresser. The following extracts from Fillmore's testimony are referred to. They relate to a brief conversation with Dresser on the street:—

"I told him that it was very evident there was a thief in the bank; that the money had been stolen. I said, 'I would advise you to look after Coleman, for I believe that he is living a pretty fast pace, and I have pretty good authority for believing that he is supporting a woman.' That is about what I said to him."

Upon cross-examination he testified:—

"X Q. 3. Give the whole of that conversation again. A. I said to him it was very evident there was a thief at the bank; that I was satisfied that my package had been stolen, and advised him to make inquiries about Coleman; that I believed he was living a pretty fast pace, and I was informed by pretty good authority that he was supporting a woman.

"X Q. 4. Is that the whole of it? A. Well, I told him who my authority was; I told him who had told me what Coleman was doing.

"X Q. 5. How long was the conversation? A. About three minutes.

"X Q. 6. He was waiting to take the car, was he? A. Yes, sir.

"X Q. 7. He made no reply? A. No, he made no reply. It might have been a five minutes' talk."

From this testimony it appears that the charge that there was a thief in the bank related to the disappearance of a special package containing $150, which Fillmore had left with Davis, a former cashier, for safe-keeping some fifteen years before, and which could not be found. It had no relation to any business of the bank, or to any matter of accounts or of bookkeeping, or to the disappearance of any funds of the bank.

There is no evidence that Coleman had anything to do with the disappearance of this box, and he denied that he did, thought testifying freely as to his defalcations. There appears no sufficient ground for Dresser's accepting Fillmore's conclusion that the box had in fact been stolen, and that for this reason there was, at the time of his conversation, "a thief in the bank," or that Coleman was a just object of suspicion on that account.

There is, however, evidence in the record of doubt in Dresser's mind as to the facts. Fillmore testified that Dresser, in a previous conversation, had asked him if Fillmore had a receipt for the box; that he replied that he had not, and that Dresser wanted to know why he did not put it in the savings bank. There is no evidence that Dresser had any personal knowledge of the existence of the box; and Earl, the cashier, testified that he did not remember seeing a box that answered the description of the one that Fillmore testified as being lost.

The expression, there is "a thief in the bank," made in this connection contained no suggestion or implication of Fillmore's knowledge of the abstraction of any funds of the bank. It suggested suspicion of Coleman, based upon disappearance of the package. How far Fillmore's grounds of suspicion of a theft were the basis of the advice to look after Coleman, and what weight Dresser should have attached to Fillmore's suspicion of theft and of Coleman as a thief, were questions peculiarly for a master who heard the oral testimony; as was also the question of what weight Dresser should have attached to the accompanying statement of Fillmore's belief that "he is living a pretty fast pace," and of his "pretty good authority that he is supporting a woman."

This brief street conversation, which is now given such grave importance, was preceded by a formal letter from Fillmore to Dresser as president, dated September 29, 1908, and relating to the loss of the package; a matter which was not new at the bank, but which previously had been under discussion with Dresser, with Earl the cashier, and the subject of correspondence with Davis, the former cashier with whom the package had been left many years before. Though in his letter Fillmore says that the package was once handed to him, "I think by Mr. Earl," Earl testified that he did not remember seeing a box that answered the description of the one Fillmore testified to as being lost. Whether the box had ever been in Earl's possession, or had disappeared during the time of Coleman's employment at the bank rather than during a previous period of eight years, is a matter of dispute upon the briefs.

But whatever the fact, there was at least substantial reason for doubt in Dresser's mind as to the justice of Fillmore's grounds for suspicion of Coleman, and as to their weight.

The letter concludes as follows:—

"While the National City Bank may not be legally bound to make the loss good, at the same time I consider it under moral obligations to reimburse me for this loss. As I never had it in my hands but at the times above-mentioned, and never removed it from the Bank, I can come to but one conclusion, that it has been destroyed or re-

moved by some one connected with the Bank. I hope you will bring this matter before the Board of Directors of your Bank, and inform me of the result at as early a date as convenient."

In this formal communication Fillmore makes no charge of theft, and no allusion to Coleman, and suggests no suspicion of him. The matter which he desires to be brought before the Board of Directors and to be informed of the result is a request for reimbursement of $150.

Fillmore received no reply to this request, and had no further conversation with Dresser, except the short street conversation above set forth.

That there was neglect by Dresser of the bank's interest in not submitting this request for reimbursement to the Board of Directors does not appear. If the letter could be regarded as notice of a loss of a package, this might have led to a further inquiry as to that loss. Such inquiry, so far as appears, would have amounted to nothing, and would not have affected Coleman; certainly there was no reason for examining the books of the bank in this connection.

Nor does the street conversation gain any weight when coupled with this letter. On the contrary, when preparing a formal communication for the consideration of the Board of Directors, Fillmore makes no charge or implication of theft by anyone; and, though a depositor, gives the president for communication to the Board of Directors no hint of his suspicion of Coleman or his mode of life, and suggests no inquiry.

After the lapse of about a month without a response to his request, and upon a casual meeting on the street, in a very brief conversation he first suggests his suspicions of Coleman. At no time, either by his letter or orally, did he suggest bringing before the Board the question of an inquiry into Coleman's conduct.

That Fillmore's suspicions were of serious weight even with himself seems doubtful from the fact that he did not withdraw his deposit, but, like Dresser, remained a depositor in the bank until it closed.

To take the statement, "there is a thief in the bank," away from its connection with the unexplained disappearance of Fillmore's package of $150 at some indefinite date, a matter having no connection with the business and books of the bank, and to convert it into a warning connected with a great loss of $300,000, more or less, through an unprecedented manipulation of the credits and books of the bank, seems unjustifiable. An inquiry into this matter, which already had been inquired into, would not naturally have led to an investigation of Coleman's bookkeeping.

Should Fillmore's statement not of facts, but of suspicions, have led to an investigation of Coleman's life out of the bank?

It should not be left out of account that Coleman was daily at the bank, where he was under observation of Dresser, and especially of Earl, the cashier. He was well behaved, industrious and courteous, and was well liked. There was no evidence that he was criticised by anyone in the bank because of anything in his conduct or bear-

g. He was known to be the son of a reputable father, who was in
siness in Cambridge, and a man of some financial standing.
How far Dresser's own knowledge of Coleman, and his judgment
om personal observation of Coleman, justified him in attaching no
ight to Fillmore's suspicions is especially a question of fact upon
hich the master, who had Coleman under close observation as a
tness, as he did also the other witnesses who testified as to Cole-
an's conduct, was much better qualified than judges who have only
printed record. That Dresser had complete confidence in Coleman
manifest. That this confidence was not in fact disturbed by Fill-
ore's statement is manifest. Should it have been? Our own knowl-
ge of men constantly leads us to discredit and instantly reject
mors and suspicions concerning them. There is no rule of law
at determines when it is reasonable and when it is unreasonable
do so. The master has found in favor of Edwin Dresser upon this
int.

The practical rules which determine the weight to be attached to
naster's report are especially applicable on just such a question
this, and for sound reasons weigh heavily in favor of this de-
ndant.

It was not unnatural that Dresser should have regarded the advise
look after Coleman as based principally upon the disappearance
the box. The record does not contain an explanation by Dresser
his reasons for attaching no weight to Fillmore's statement of his
spicions. At the time of Dresser's examination he testified that
was born December 16, 1826, was eighty-seven years old, and dur-
g the last two and one-half years preceding his testimony had been
k most of the time; and that he had not the slightest recollection
Fillmore telling him that there was a thief in the bank, or of
nding him a letter. As the master found Fillmore a credible wit-
ss, the lack of explanation by Dresser was presumably due to a
tural failure of memory during the period following the closing
the bank. But the fact that Dresser was the largest depositor in
bank, and that the bank's interests and his own were to so great
extent identical, as well as the testimony as to his regular busi-
s habits, seem inconsistent with a reckless disregard of notice of
actual fact brought to his attention affecting the trustworthiness
he employees of the bank.

f Dresser erred in considering all that Fillmore said as a mere
ident to his claim for reimbursement for the loss of the package,
l should have made inquiry into the statement as to Coleman's
porting a woman, the inquiry would probably have led then, as
id later, to the explanation that the woman was engaged to Cole-
n; that she had occasionally called at the bank, and that she was
lady-like and well-appearing young woman."

Another and distinct "warning" is found in Coleman's ownership
an automobile—"A clerk at $12 a week with an automobile!"
e the expression, "there's a thief in the bank," this is given a
e value if dissociated from the rest of the facts.

The master had before him evidence that Coleman, after bank
rs, was engaged in the automobile business, had sold a number

of automobiles, one to a director of the bank; that the young man, though working at a small salary, lived at home with his father, who was reputed to be of good financial standing, and the testimony of a witness who said that Coleman's father was reputed wealthy and that it did not surprise him to see the son have an automobile; also testimony that the price of the automobile—$800—was paid for in part by commissions on sales of other machines, and that Coleman made no concealment of the machine, but invited persons connected with the bank, including Dresser, to ride with him.

There is also meagre evidence that Coleman had discussed copper stocks with Dresser. The master specifically found that Dresser had no knowledge that Coleman was speculating in stocks, and it is evident that a contrary finding, or a finding that Dresser had reasonable cause to suspect Coleman of stock gambling, could not justly be based upon the very meagre evidence on this point.

It seems erroneous to assume that all of these so-called warnings, or grounds for suspicion, were ever assembled in Edwin Dresser's mind in the form in which they are assembled in the appellee's brief.

We should also take into full account the fact that the cashier, Earl, as executive officer of the bank (Merchants Bank v. State Bank, 10 Wall. 604, 650), had full opportunity to observe Coleman, and that Dresser was reasonably entitled to rely greatly upon Earl's observation of Coleman and upon his discovery of any apparent irregularities in his conduct.

We are not informed that any of the bank's money was spent upon Coleman's automobile, or upon a woman whom he was supporting, or to what extent, if at all, it was spent in stock gambling.

Upon the theory that the principal negligence was the failure of the directors to make such examinations of the books as were required of them this might perhaps have been regarded as a subordinate matter. But upon the reversal of the District Court on this point the question how far the loss of the bank's money was in fact due to matters of which Dresser had notice enough to put him on inquiry seems of special importance.

If it be conceded that the proofs are sufficient to show that Edwin Dresser was negligent in failing to heed warnings of Coleman's untrustworthiness, and if we apply the rule that notice sufficient to put one on inquiry is notice of everything to which inquiry might have led, this, in my opinion, should lead not to the affirmance of the judgment against Dresser for the full amount of Coleman's defalcations, but rather to sending the case back to the District Court for a reassessment of damages.

The plaintiff's evidence fails to show to what extent Coleman's appropriation of the bank's funds was due to any of the matters of which it is claimed Dresser had notice.

It must be borne in mind that this is not an action of tort. In view of the decision of the District Court that the action against Dresser's administrator survives because the cause of action is ex contractu rather than ex delicto (229 Fed. 798), there is special force in defendant's argument that the liability is only for such loss as was the natural and probable consequence of negligence, and

which ought to have been foreseen in the light of attending circumstances. Negligence is a failure to take reasonable precautions against that which is reasonably to be apprehended.

This case presents the remarkable feature that there was no reasonable cause for apprehension that a bank could be reduced to a mere shell by the unprecedented method adopted by Coleman. It is also remarkable in that the causes which led to such large misappropriations by Coleman were in a great part equally outside the bounds of reasonable anticipation. That this large loss of the bank was due to any causes operating upon Coleman which, upon the most favorable view of the plaintiff's evidence, should have been investigated is not proved in this record; which, though it sets forth slight evidence concerning the purchase of stocks, extravagances in mode of life, etc., is yet very meagre as to the causes which led Coleman to his large defalcations.

In considering, however, the question whether the present judgment should be affirmed, or whether the case should be sent back for further proceedings to determine the damages, we cannot indulge in any presumption that the matters in respect to which negligence is charged were the causes which led him to ruin the bank. We cannot disregard the fact that from our own records and from the reported decision of this court there appears explanation as to the disposition by Coleman of the bank's funds, and as to the causes which led him to such disposition, which destroys any presumption that the bank's losses were wholly due to matters in respect to which the defendant Dresser was negligent; and shows that they were due principally to an unprecedented combination of circumstances in which third parties intervened with a scheme for making Coleman a conduit for conveying to them the bank's funds, and for despoiling Coleman as well as the bank,—a scheme of third parties in which Coleman was but the cat's-paw.

If Coleman had associated himself with a band of burglars, and admitted them to blow the safe locked against him, it would seem quite clear that this would be so remote a cause of loss that the defendant Dresser could not be responsible for it by reason of the evidence in this case.

We cannot ignore the fact that upon the records of this court is something quite analogous to such a case, and it is not improper, in the interests of justice, to take judicial cognizance of facts appearing upon our own records and of great notoriety in this community, although, of course, we give weight to these only upon the question of affirmance or retrial of the question of damages. In Keliher v. United States, 193 Fed. 8, 12, appears the following:—

"Therefore the United States proved by Coleman, apparently without objection, that he misapplied approximately $211,000 on and after the second day of June, 1909, and that of this amount all but a sum not exceeding in the whole $50,000 was lost through his connection with the plaintiff in error"; *i. e.*, Keliher.

In Spade v. Lynn & Boston Rd., 168 Mass. 285, it is said:—

"Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties; not merely what it might

be right for an injured person to receive to afford just compensation for his injury, but also what it is just to compel the other party to pay."

A court of equity called upon to measure a just compensation for breach of a contractual duty is not required to apply the rule of damages applicable in cases of wanton or wilful wrong. The damage to be recovered should be the natural and proximate consequence of the act complained of, and those results considered proximate which the wrongdoer from his position must have contemplated as the probable consequence of his breach of contract. Smith v. Bolles, 132 U. S. 125, 130; Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540; Pollock on The Law of Torts, 10 Eng. Ed., p 582, 583; p. 41. Milwaukee & St. Paul R. R. Co. v. Kellogg, 94 U. S. 467, 475; Atchison, etc. Ry. Co. v. Calhoun, 213 U. S. 1, 7.

That Coleman, a bookkeeper constantly under the supervision of a cashier, and whose fidelity bond was fixed at the sum of $5,000, as a reasonable measure of the risks incident to his position, would have either the opportunity or the temptation to do what the appellee's brief characterizes as "the seemingly impossible," was far outside the bounds of reasonable foresight. I know of no authority which visits upon one who has failed in the performance of a contractual duty damages beyond the limits of what reasonably ought to have been foreseen, or which condemns him in damages to the extent of what is "seemingly impossible."

I feel constrained to dissent on the grounds:—

First. That the master's report should be adopted, and should not be set aside.

Second. That assuming negligence as found by the majority the amount of damages is not justified by the evidence.

United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1265.

SUMNER DRESSER, Administrator, Defendant, Appellant,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

No. 1266.

GEORGE W. GALE et al., Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

No. 1267.

CLARENCE ALFRED BUNKER et al., Administrators, Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

Appeals from the District Court of the United States for the District of Massachusetts.

Before Dodge, Aldrich and Brown, JJ.

On Motion to Amend Decree.

Memorandum Opinion by Direction of the Court, by Judge Aldrich.

April 8, 1918.

The motion to amend the decree of this court of March 5, 1918, by adding the words "interest on the said amount to run from February 1, 1916, the date of the final decree in said District Court," is denied.

Rule 30 of this court and Rule 23 of the Supreme Court are the same as to interest upon judgments below in actions at law. These rules, however, in their ordinary sense, are understood to apply to judgments which are affirmed in toto, and not necessarily to judgments which are modified in substantial respects.

In equity the rule likewise applies, in terms, only to decrees which are affirmed, and not to substantially modified decrees. But, recognizing the idea of the existence of inherent discretion, the general rule in equity that interest shall be calculated upon decrees which

are affirmed, is subject to the important qualification that it may be otherwise ordered. It being thus assumed, by such express qualification, that reasons may exist which would make it inequitable to allow interest, even where the decree is in all respects affirmed, it may safely be assumed, we think, that more and stronger reasons may be found for doing the same thing, where the decree below is not affirmed in full, or in fact, but subjected to substantial modifications under a decretal order which directs how the modifications shall be made, and which, by its terms, becomes operative as an affirmance only upon the modified creation. Under such circumstances, the plaintiff's right to recover is not established by the original decree, but by a modified one upon which the affirmance operates when the modification is made as directed.

It is probably quite correct to say, especially in equity cases, that it is reasonably within the realm of discretion,—in cases where the recovery relates to unliquidated damages and to situations where recovery is not for money misappropriated and used by the defendant, but where he is sought to be charged upon the ground of negligence or the wrong-doing of another, and where the appeal is not for delay, but prosecuted in good faith upon substantial and close lines of controversy in respect to liability,—for the court to say, if it finds equitable grounds for saying it, that interest ought to follow, or that it ought not to follow, and this without regard to whether the decree is affirmed in whole or in part. Steel Co. v. New York City R. R., 198 Fed., 778, 779, 780; Co. v. Co., 232 Fed., 508; De La Rama v. De La Rama, 241 U. S., 154, 159.

The decision here did not hold Edwin Dresser for the amount decreed below, nor did it hold him upon the ground that he was negligent and liable in respect to the whole period covered by the District Court. The directed decree and the modified recovery are based upon only a part of the time covered by the findings and the decree of the District Court. Consequently, in quite a substantial sense the directed decree will become an original one, and the plaintiff's right of recovery is thus to be established by a decree which is to be made in accordance with the mandate of this court based upon different facts and different findings than those involved in the first decree of the District Court.

The District Court says nothing about interest. Neither does the decree of this court.

The reason for not allowing interest in equity, and under such circumstances, resides largely in the fact that the damages are unliquidated and must, in a sense, remain so until liquidated under the directions of the mandate; and it is because of this that the liquidated sum, as finally ascertained, is often adopted as the amount for which the right of recovery should be established through the instrumentality of the directed decree. The view that damages, as finally ascertained and decreed often become the amount of recovery and that interest, something in the nature of damages, remains in abeyance until the right is established by the decree, in accordance with the mandate, is accepted by the Supreme Court as so far conclusive that it is said that, where the decree of the appellate court

oes not expressly carry interest, none can be awarded by the court
) which the decree is directed. Himely v. Rose, 5 Cranch, 313,
16; Boyce v. Grundy, 9 Pet., 275, 289, 290; In re Co., 140 U. S.,
1, 96.

There would seem to be no principle upon which to ground inter-
t upon unliquidated damages, or upon judgments and decrees for
nliquidated damages, until they are determinate in every substan-
al sense.

Interest upon judgments and decrees which are affirmed is upon
ie idea that they were fixed and distinct muniments of right which
ie appellate court approves, as something which should stand, not
nly in substance, but in terms. Where a decree is modified or
econstructed upon different lines, the right was not defined and
tablished by an original judgment or decree, but is defined and
tablished by another, a later and a different muniment, conse-
uently the reason for interest upon affirmed judgments and decrees
oes not exist in the latter circumstances. Doubtless the directed
ecree might be so closely like the original one as to justify an order
r interest upon equitable grounds, but it would not come under
ıy rule of strict right.

Where the right of interest is not established by contract, by stat-
e, or by judgment, it ordinarily comes as an allowance in the
ature of damages, based upon use or wrongful detention. Pike v.
regory, 118 Fed., 128, 129; U. S. v. N. C., 136 U. S., 211, 216.

On the whole, and under the circumstances of this case, we incline
the view that there are no sufficient equitable reasons for allowing
terest upon the unliquidated damages which resulted from losses,
e amount of which is to be hereafter ascertained, in order that the
easure of the plaintiff's right of recovery may be known and estab-
hed by a modified decree to be hereafter formulated by the District
ourt.

Where damages are unliquidated, there is usually no interest until
e right to the principal is established or, in other words, until
dgment or decree. It is understood that when the District Court
s made the ascertainments directed by the decree of this court of
arch 5, 1918, and entered a decree thereon, that the decree of
arch 5 will then operate in affirmance thereof and as of the date of
entry. It is not, however, in fact, an affirmance of the old decree,
t of the reconstructed one. It was not intended in any other
ıse. It is one of those, not unusual, cases where certain things
e directed to be done, and when done, the decree of affirmance,
ough earlier, is made to operate upon the perfected condition
thout again coming to the appellate court.

Judge Brown having dissented on the main question of liability
kes no part in the decision of this question.

United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1265.

SUMNER DRESSER, Administrator, Defendant, Appellant,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

On March 20, 21, 22 and 23, 1917, this case came on to be heard together with Nos. 1266 and 1267, and was fully heard by the court, Honorable Frederic Dodge, Circuit Judge, Honorable Edgar Aldrich and Honorable Arthur L. Brown, District Judges, sitting.

Thereafter, to wit, on March 5, 1918, the Opinion of the Court (page 1) was announced, an Opinion by Brown, J., dissenting in part (page 28) was filed and the following Final Decree was entered:—

Final Decree.

March 5, 1918.

This case came on to be heard March 20, 21, 22 and 23, 1917, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, March 5, 1918, here ordered, adjudged and decreed as follows: The decree of the District Court, except as against Edwin Dresser's administrator, is reversed. The case is remanded to that court, with directions to dismiss the bill as against the other defendants, and to modify the decree against said administrator by reducing the damages awarded to the amount of Coleman's defalcations from December 1, 1908, to the close of the bank. So modified, said decree is affirmed. The appellants recover their costs of appeal.

By the Court:

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on March 6, 1918, the following Motion to Amend Decree was filed:—

United States Circuit Court of Appeals for the First Circuit.

No. 1265.

SUMNER DRESSER, Administrator, Defendant, Appellant,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

No. 1266.

GEORGE W. GALE et al., Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

No. 1267.

CLARENCE ALFRED BUNKER et al., Administrators, Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

Appellee's Motion to Amend Decree of March 5, 1918.

(Filed March 6, 1918.)

Now comes John L. Bates, Receiver, Appellee and moves that the decree entered herein, to wit, on March 5, 1918, be amended by striking out the period after the word "bank" in said decree and adding the words "interest on the said amount to run from February 1, 1916, the date of the final decree in said District Court."

So that the said decree of March 5, as modified shall read, "The decree of the District Court, except as against Edwin Dresser's administrator is reversed. The case is remanded to that court, with directions to dismiss the bill as against the other defendants, and to modify the decree against said administrator by reducing the damages awarded to the amount of Coleman's defalcations from December 1, 1908 to the close of the bank, interest on the said amount to run from February 1, 1916, the date of the final decree in said District Court. So modified, said decree is affirmed. The appellants recover their costs of appeal."

JOHN L. BATES,
Receiver, Appellee,
By His Attorney, FRANK N. NAY.

Thereafter, to wit, on March 28, 1918, a hearing was had on the motion to amend decree, Honorable Frederic Dodge, Circuit Judge,

and Honorable Edgar Aldrich and Honorable Arthur L. Brown, District Judges, sitting.

Thereafter, to wit, on April 8, 1918, a memorandum opinion by direction of the Court, by Judge Aldrich, on motion to amend decree (page 39) was announced and the following Order of Court was entered:—

Order of Court.

April 8, 1918.

It is ordered that appellee's motion to amend the decree of March 5, 1918, be, and the same hereby is, denied.

By the Court:

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on April 30, 1918, the following Motion for stay of Mandate was filed:—

Motion for Stay of Mandate.

(Filed April 30, 1918.)

Now comes Sumner Dresser, Administrator, Defendant, Appellant, in the above entitled cause, and moves that the issue of the mandate to the United States District Court for the District of Massachusetts be stayed until further order of this court, on the grounds that said appellant intends to prosecute an appeal to the Supreme Court of the United States.

By His Attorneys: ROBERT M. MORSE,
PAUL DUDLEY DEAN,
JOHN B. SULLIVAN, Jr.

Assented to,
JOHN L. BATES,
Receiver, Plf. Appellee.

On the same day, to wit, April 30, 1918, the following Order of Court was entered:—

Order of Court.

April 30, 1918.

Upon motion of appellant, assented to. It is ordered that the mandate herein be, and the same hereby is, stayed until further order of the court.

By the Court:

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on May 31, 1918, the following Petition for Appeal, Assignment of Errors and Bond on Appeal were filed by the Appellee:—

Petition for Appeal.

(Filed May 31, 1918.)

Now comes John L. Bates, Receiver, Appellee from this Court, by his solicitor, and complains that in the record and proceedings, and also in the rendition of the decrees of this court sitting at Boston, in the Commonwealth of Massachusetts, and in the above styled and numbered cause on the fifth day of March, 1918, modifying the decree of the United States District Court for the District of Massachusetts, in the said cause, to wit, the decree of February 1, 1916, and in the decree of this court dated April 8, 1918, manifest error has intervened to the great damage of the petitioner: that the jurisdiction of said Circuit Court of Appeals and the said United States District Court depended upon the fact that the rights and responsibilities of directors of a national bank, and the construction of United States statutes concerning national banks, were involved, and that the said John L. Bates, petitioner, is Receiver of the National City Bank of Cambridge, Massachusetts, and sues in such capacity to hold certain directors of said bank responsible for losses incurred by their negligence; that the matter involved in the litigation and the matters in controversy exceeds the sum of one thousand dollars ($1,000) besides costs, and that this is not a case in which the jurisdiction of said Circuit Court of Appeals is made final.

Wherefore, the petitioner, John L. Bates, Receiver of the National City Bank of Cambridge, Massachusetts, files herewith his assignment of errors and prays that an appeal to the Supreme Court of the United States may be allowed him for the reasons set forth in said assignment of errors, and that a citation may issue and a transcript of the record, proceedings and papers in the said cause upon which said decrees were made may be transmitted to the said Supreme Court of the United States. And petitioner also prays for any other and further process which may be required to perfect the appeal prayed for to the end that all errors may be corrected. And the said petitioner prays that the said decrees of the said Circuit Court of Appeals for the First Circuit, to wit, the decrees dated March 5, 1918, and April 8, 1918, may be reversed and that the said Circuit Court of Appeals for the First Circuit may be directed to enter a decree affirming the decree of the United States District Court for the District of Massachusetts, to wit, the decree of February 1, 1916, with costs and interest from that date.

JOHN L. BATES,
Receiver of The National City Bank of Cambridge, Massachusetts.
By FRANK N. NAY,
His Solicitor.

Allowed May 31, 1918.
FREDERIC DODGE,
U. S. Circuit Judge.

Assignment of Errors.

(Filed May 31, 1918.)

And now on this 31st day of May, 1918, comes John L. Bates, Receiver, Appellee in this court, by his Solicitor, Frank N. Nay, and says the decrees entered in the above cause, to wit, on the fifth day of March, A. D. 1918, and on the eighth day of April, 1918, are erroneous and unjust to him, the said Receiver:

(1) Because the said Circuit Court of Appeals by said decree remanded the said cause to the United States District Court for this District with directions to modify the final decree of the said District Court of February 1, 1916, by reducing the damages awarded to the amount of the defalcations of one Coleman from December 1, 1908, to the close of the National City Bank, of which said John L. Bates is Receiver, whereas said final decree of said United States District Court dated February 1, 1916, held the appellant, administrator as aforesaid, liable to the said Receiver for the amount of the defalcations of said Coleman from September 30, 1907, to the close of the said Bank, a reduction of $19,130.18.

(2) Because the said Circuit Court of Appeals in its said decrees refused to allow the said Receiver any interest whatever on any amount from said February 1, 1916, or from any date.

(3) Because the said Circuit Court of Appeals in its decision filed with said decree of March 5, 1918, held that on the record in the case, Edwin Dresser, the intestate of Sumner Dresser, Appellant in this Court, was negligent only in the following respects, namely: In disregarding express warnings concerning said Coleman and his conduct, and in failing, as the official head of the Bank and in general charge of its business and familiar with the details thereof, to observe the conduct and doings of the said Coleman in the Bank during banking hours, and outside the Bank where he, the said Edwin Dresser, had opportunities to observe and did so observe, whereas the said Court should upon the record have held the said estate of Edwin Dresser also responsible because of numerous other acts of negligence and omissions due to negligence, among others, the following:

a. In being a party to putting the deposit ledger of the Bank in the sole charge of the said Coleman at a time when the said Coleman was less than eighteen years of age and permitting the same to remain in his sole charge with no effective supervision from said date until the close of the Bank.

b. As President and Director, in retaining said Coleman as such bookkeeper without ascertaining that he was making frequent and careless mistakes in his work.

c. In disregarding warnings of an auditor who examined the Bank in 1903 and 1904, concerning the importance of the deposit ledger being carefully and accurately kept.

d. In being ignorant that the cashier was permitting the bookkeeper to open the envelopes received daily from the Boston Clear-

ng House and remove the checks, the said cashier himself seldom, r never, seeing the checks thus coming into the bank for payment.

e. In giving no weight to the fact that three successive tellers, he Bank employing but one teller, who acted as both receiver and aying teller, were found short in their cash, all experienced men, ll denying any responsibility in the matter, while the arrange- ients of the Bank and the lack of the teller's cage made it apparent hat some one else within the Bank might be the guilty party, and hen, as a matter of fact, the said Coleman was, as appears on all he evidence, the party guilty of all said shortages.

f. In being a party to making the said Coleman paying and eceiving teller, as well as bookkeeper, for a period of about twenty- ve (25) months, during which period he began his stealings, and ole a large amount. The said Coleman being thus put in a posi- on where it was easy for him to steal and to conceal his stealings y false entries in inactive accounts, and with almost no chance of etection.

g. In assuming that the books examiner's necessarily rapid ex- minations of the Bank twice a year, when he knew, or should ave known, that most of the time was spent by the examiner on ans and collateral, was the equivalent of an audit, having no just eason to make any such assumption, and making this assumption the face of the fact known to him that a real audit of the Bank ade in 1903 and 1904 had taken seven or eight days' time of a mpetent auditor and at a time when the Bank had fewer accounts an during the time when the said Coleman was bookkeeper.

h. In permitting numerous meetings of the directors to be omitted ithout adequate excuses.

i. In disregarding, without any excuse, the express provision of e By-Law, which required semiannual examinations of the Bank the directors and comparisons to ascertain if the books were rrectly kept; whereas, if said examinations had been regularly eld and the terms of the By-Law, as set forth in the record, com- lied with, the said defalcations would have been discovered at an rly stage, and the great bulk of the defalcations of the said Cole- an prevented.

j. In wholly failing to investigate and ascertain the causes of the parent shrinkage of the Bank's deposits from about $368,000 to out $107,000, this apparent shrinkage occurring during a period hen no depositors were withdrawing accounts and when as a fact e real deposits of the Bank were actually increasing.

k. In having no audit or careful examination of the Bank made om July, 1903, to February 21, 1910, the date the Bank closed s doors.

l. In permitting the said Coleman, then aged less than twenty, to ave the combination of the cash box and actual access to the Bank's sh from about the time he became teller, late in 1905 or the very rly part of 1906.

(4) In holding that Article 19 of the Bank's By-Laws might be holly disregarded by the directors, as they did disregard it, and

that none of the directors were responsible for such disregard, said By-Law being as follows:

"Sec. 19. There shall be appointed by the Board, every six months a Committee whose duty it shall be to examine into the affairs of the Bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the Bank is in a sound and solvent condition; the result of which examination shall be reported to the Board at their next regular meeting."

And in holding that the By-Law imposed no special duty upon the directors, and that the same might be disregarded by them, no special reason tending to forbid such omission being shown, and in further holding that the directors' long continued practice of omitting to comply with the requirements of the said By-Law exonerates, or tends to exonerate, them from failing to comply with its requirements.

5. In holding that the very great apparent shrinkage in deposits was not of itself enough legally to require the directors and President of the Bank to be on their guard and to make a full investigation as to the causes thereof.

6. In finding that the methods employed by Coleman in accomplishing and concealing his thefts were, "ingenious, and appear to have been altogether novel." Whereas stealing money as teller from his teller's cash was neither ingenious nor novel. And whereas making fictitious charges on the deposit ledger to depositors' accounts was neither ingenious nor novel. And whereas giving his own balance false credits upon the deposit ledger was neither ingenious nor novel. And whereas making false footings of the additions of columns on the deposit ledger was neither ingenious nor novel, the foregoing methods of his stealings upon the book constituting, as appears by the record, almost all the falsifications of the deposit ledger as originally made to cover thefts from day to day, the other falsifications being, for the most part, made subsequently and to conceal thefts previously made and to put the books into condition to deceive the Bank examiners, and being likewise neither ingenious nor novel.

(7) In apparently holding that the fact that the National Bank examiners did not in their examinations detect anything wrong during the period of Coleman's stealings tends to exonerate all the directors; the said examinations having been made by representatives of the Comptroller of the Currency, for the purpose of giving him full information regarding the Bank, and not having been made for the benefit of the directors, no copies having been furnished them, and the directors, as a matter of law, not having been entitled to rely in any way upon such examinations as relieving them from their own duties and responsibilities.

(8) In holding, in effect, that the directors in failing to make or cause to be made full examination of the Bank's condition from time to time after September 30, 1907, were not guilty of negligence, and that the Master's finding on this point should have been con-

firmed by the District Court, whereas, as appears by the record, there was no dispute on the primary facts in the matter, and the District Court in reversing the Master on this question merely reached different conclusions on established facts, the rule in favor of the findings of a Master who has seen and heard the witnesses and must judge of their credibility on contested questions of fact, having no application.

9. In allowing the said Sumner Dresser, Administrator, to recover costs of his appeal from said United States District Court to the United States Circuit Court of Appeals for the First Circuit, whereas, instead of the decrees appealed from, this Court should have entered a decree affirming the decree of February 1, 1916 entered by the United States District Court for the District of Massachusetts with interest and costs.

JOHN L. BATES,
Receiver, Plaintiff, and Appellee in This Court.
By FRANK N. NAY,
His Solicitor.

Bond on Appeal.

(Filed May 31, 1918.)

Know all men by these presents, That I, John L. Bates, Receiver of the City National Bank of Cambridge, Cambridge, Massachusetts, am held and firmly bound unto Sumner Dresser, Administrator of the Estate of Edwin Dresser, of Brookline, Massachusetts, in the full and just sum of Two Hundred and Fifty dollars ($250) to be paid to the said Sumner Dresser, Administrator as aforesaid, his certain attorneys, executors, administrators, successors or assigns; to which payment, well and truly to be made, I bind myself, my successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with my seal and dated this 31st day of May in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at the Circuit Court of Appeals of the United States for the First Circuit in a suit in equity depending in said Court between Sumner Dresser, Administrator as aforesaid, Defendant, and John L. Bates, Receiver, as Plaintiff, a decree was ordered to be entered against the said John L. Bates, Receiver, as the plaintiff, and the said John L. Bates, Receiver, having obtained an appeal to remove said cause to the United States Supreme Court to reverse the decree so ordered in the aforesaid suit, and a citation directed to the said Sumner Dresser as administrator, as aforesaid citing and admonishing him to be and appear in the United States Supreme Court in the City of Washington, District of Columbia on the 29th day of June, 1918.

Now the condition of the above obligation is such, That if the said John L. Bates, Receiver, shall prosecute his said appeal to effect, and answer all costs against him if he fail to make his appeal good,

then the above obligation to be void; else to remain in full force and virtue.

JOHN L. BATES. [SEAL.]

Signed and delivered in presence of
W. K. KNEELAND.

(Endorsed:) Assented to, Robert M. Morse, Paul Dudley Dean, John B. Sullivan, Jr., for Sumner Dresser, Admtr's.

On the same day, to wit, May 31, 1918, the following Order of Court was entered:

Order of Court.

May 31, 1918.

Appellee's bond with approval endorsed thereon having been filed, It is ordered that citation on appeal to the Supreme Court signed by the Senior Circuit Judge issue.

By the Court: ARTHUR I. CHARRON,
Clerk.

(D. C. Form 147.)

Citation on Appeal.

UNITED STATES OF AMERICA, *ss.:*

The President of the United States, To Sumner Dresser, Administrator of the Estate of Edwin Dresser, late of Cambridge, Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the twenty-ninth day of June next, pursuant to an Appeal duly obtained from a decree of the United States Circuit Court of Appeals for the First Circuit, wherein John L. Bates, Receiver of The National City Bank of Cambridge, a national banking association established and existing under the laws of the United States in the city of Cambridge, Massachusetts, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Senior Circuit Judge and a Judge of the United States Circuit Court of Appeals for the First Circuit, this thirty-first day of May, in the year of our Lord one thousand nine hundred and eighteen.

FREDERIC DODGE,
Senior Circuit Judge.

JUNE 3, 1918.

ervice of the within citation is hereby accepted.

SUMNER DRESSER,
Administrator.
By PAUL DUDLEY DEAN,
JOHN B. SULLIVAN, JR.,
Solicitors.

hereafter, to wit, on June 1, 1918, the following Petition for eal, Assignments of Error, Stipulation in Regard to Bond on eal, and Bond on Appeal were filed by appellant.

In the United States Circuit Court of Appeals, First Circuit.

No. 1265.

SUMNER DRESSER, Administrator, Defendant, Appellant,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

tion for Appeal to the Supreme Court of the United States from the Circuit Court of Appeals for the First Circuit.

(Filed June 1, 1918.)

he Honorable the Judges of the Circuit Court of Appeals for the irst Circuit:

he above-named Sumner Dresser, Defendant, Appellant, being rieved by the judgment and decree entered in the above entitled e on the 5th day of March, A. D. 1918, does hereby appeal from decree to the Supreme Court of the United States for the rea- set forth in the Assignment of Errors filed herewith, and repre- s that the matter in controversy in said suit exceeds in value One sand ($1,000) Dollars, besides costs; that this cause is one in h the United States Circuit Court of Appeals for the First uit has not final jurisdiction; and he prays that his appeal be ved and that citation be issued as provided by law, and that a script of the record, proceedings and documents upon which decree was based, duly authenticated, be sent to the Supreme rt of the United States under the rules of said Court in such s made and provided. And your Petitioner further represents a stipulation in regard to security has been made by the parties to and filed in court whereby it is agreed that the personal bond umner Dresser, Administrator, Appellant, in the sum of five sand (5,000) dollars be taken as sufficient security to be re- ed of him on his appeal in lieu of supersedeas bond.

Wherefore, he prays that the proper order in regard to such security be made.

By his Attorneys: ROBERT M. MORSE,
PAUL DUDLEY DEAN,
JOHN B. SULLIVAN, Jr.

Allowed June 1, 1918.
FREDERIC DODGE,
U. S. Circuit Judge.

United States Circuit Court of Appeals for the First Circuit.

SUMNER DRESSER, Administrator, Defendant, Appellant,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

Assignments of Error by Sumner Dresser as Administrator of the Estate of Edwin Dresser.

(Filed June 1, 1918.)

And now comes Sumner Dresser as he is the Administrator of the estate of Edwin Dresser, late of Cambridge, in the County of Middlesex and Commonwealth of Massachusetts, defendant appellant, and files the following assignments of error upon which he will rely on his presentation of his appeal in the above-entitled cause from the order and decree made by this court on the fifth day of March, 1918:

1. That the court erred in ruling and finding that Edwin Dresser was negligent in his conduct as President and Director of the National City Bank.

2. That the court erred in ruling and finding that Edwin Dresser was negligent in failing to take any steps regarding what one Fillmore had told him about the loss of a small box left by Fillmore with one Davis, a former cashier of the National City Bank, for safe-keeping, some fifteen years before, and that because of such failure he was responsible for all losses to the bank caused by Coleman from the end of November, 1908.

3. That the court erred in not giving due weight to the finding of the Master that Fillmore's statement under the conditions then existing was not such as reasonably to call for an investigation by Edwin Dresser of Coleman's conduct in connection with the bank, such finding by the Master being entitled to peculiar weight in view of the fact that he alone saw the witnesses and could form the best opinion as to how much weight a reasonable man would give to Fillmore's opinions and hearsay charges against Coleman and to what extent Coleman's appearance and personality in connection with his work and behavior in the bank up to the time of the statement would influence a reasonable man to disregard and disbelieve Fillmore's opinions and charges.

4. That the Court erred in finding and ruling that charges against Coleman had been seriously made to Edwin Dresser, whereas no charge of dishonesty or misconduct or failure to perform his duties properly in the bank on the part of Coleman had been made at any time by any person to said Dresser.

5. That the court erred in finding that Edwin Dresser did not know or had ever asked how Coleman had paid for his automobile, whereas it was in evidence that Edwin Dresser had been told by the Cashier that Coleman was using the automobile in his business as an automobile salesman and had paid for the car out of the commissions earned by him.

6. That the court erred in finding and ruling that Edwin Dresser should have taken action in consequence of the remark to him by Campbell in February, 1909, in reference to Coleman's use of an automobile, it being in evidence that at that time Dresser knew that Coleman was using the automobile in his business as an automobile salesman and had paid for the *the* automobile with his commissions.

7. That the court erred in finding that there was evidence that Coleman made frequent journeys to New York on the afternoon trains returning in the morning.

8. That the court erred in finding that there was evidence that he made stupendous losses or any losses at faro.

9. That the court erred in finding and ruling that it was quite within the realm of probabilities that if reasonable circumspection had been exercised and reasonable inquiries and investigations made as to Coleman's habits and doings, his frequent journeys to New York on the afternoon trains, returning in the morning, and his stupendous losses at faro would have been uncovered and the bank's money saved.

10. That the court erred in assuming that there was evidence in the record of Coleman's journeys to New York on the afternoon trains and returning in the morning, and in considering evidence which the court said was disclosed in the trial of one Kelliher, but which evidence was not in the record before the Circuit Court of Appeals.

11. That the court erred in finding and ruling that there was evidence that Coleman had given orders to brokers for the purchase or sale of stocks in the presence of Edwin Dresser, or with the knowledge of Edwin Dresser.

12. That the court erred in finding and ruling that Edwin Dresser had notice of Coleman's speculative dealings.

13. That the court erred in finding and ruling that the occasions were numerous and common upon which Edwin Dresser on examinations of his own account or of the Standard Diary Company upon the depositors' ledger would have detected gross errors in the balances appearing on said accounts.

14. That the court erred in finding and ruling that it was negligence for Edwin Dresser not to examine the depositors' ledger.

15. That the court erred in failing to find and rule that the Cashier had the supervision of the *the* bank's employees and had entire confidence in Coleman's honesty and capacity, and that Edwin

Dresses knew of the *the* Cashier's good opinion of Coleman and had seen and known nothing to cause suspicion on his part in regard to Coleman and that Edwin Dresser had the right to rely on the confidence of the Cashier in Coleman.

16. That the court erred in finding and ruling that Edwin Dresser was negligent in failure to investigate Coleman because of the drop in deposits in September, 1909.

17. That the court erred in finding and ruling that from an examination of the checks on file in the bank Edwin Dresser could have found the missing checks representing Coleman's stealings, the fact being that checks which were missing could only have been ascertained from a careful comparison of all the checks with the depositors' ledger and with the Clearing House slips.

18. That the Court erred in ruling that the damages for which Edwin Dresser was liable for failure to investigate Coleman in consequence of Fillmore's communications to him and in failing to inform the directors of Fillmore's communications was the entire losses of the bank due to Coleman's defalcations from the time of Fillmore's communications to Edwin Dresser.

19. That the court erred in failing to rule that negligence on the part of Edwin Dresser in the discharge of his duties as President and Director would be failure to take reasonable precautions against that which he might reasonably apprehend, and that the damages for which he would be liable would be only for such losses as were the natural and probable consequences of his negligence, and which ought to have been foreseen in the light of attending circumstances.

20. That the court erred in failure to find and rule that there was no evidence that the losses caused by Coleman's defalcations were the natural and probable consequences of negligence on the part of Edwin Dresser and ought to have been foreseen by him in the light of attending circumstances.

By His Attorneys: ROBERT M. MORSE,
PAUL DUDLEY DEAN,
JOHN B. SULLIVAN, Jr.

Stipulation in Regard to Security to be Required of the Appellant.

(Filed June 1, 1918.)

It is hereby stipulated and agreed that the personal bond of Sumner Dresser, Administrator Appellant, in the sum of ($5,000) five thousand dollars be taken as sufficient security to be required of him on his appeal in lieu of supersedeas bond.

FRANK N. NAY,
Att'y for Plf., Appellee.
ROBERT M. MORSE.
Att'y for Sumner Dresser, Adm'r, Appellant.

Bond on Appeal.

(Filed June 1, 1918.)

Know all men by these presents, That I, Sumner Dresser, of Brookline, Massachusettts, am held and firmly bound unto John L. Bates, Receiver of the National City Bank of Cambridge, in the full and just sum of Five Thousand (5000) Dollars, lawful money of the United States, to be paid to the said John L. Bates, Receiver, his certain attorney, executors, administrators, successors or assigns: to which payment, well and truly to be made, I bind myself, my heirs, executors and administrators, by these presents.

Sealed with my seal and dated this first day of June, 1918.

Whereas, lately at the United States Circuit Court of Appeals for the First Circuit, in a suit in Equity depending in said Court between John L. Bates, Receiver, as appellee and Sumner Dresser et als., Appellants, a decree was entered against the said Sumner Dresser, as he is Administrator of the Estate of Edwin Dresser, late of Cambridge, Massachusetts, and the said Sumner Dresser, as Administrator as aforesaid having obtained an appeal to remove said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said John L. Bates, Receiver, citing and admonishing him to be and appear in the Supreme Court of the United States, in the City of Washington, in the District of Columbia, on the twenty-ninth day of June, A. D. 1918.

Now therefore, the condition of the above obligation is such, That if the said Sumner Dresser, as Administrator as aforesaid shall prosecute his appeal to effect, and answer all costs awarded against him if he fail to make his appeal good, then the above obligation shall be void; otherwise to remain in full force and virtue.

SUMNER DRESSER. [SEAL.]

Witness:
JOHN B. SULLIVAN, Jr.

On the same day, to wit, June 1, 1918, the following Order of Court was entered:

Order of Court.

(June 1, 1918.)

Appellant's bond with approval endorsed thereon having been filed, It is ordered that citation on appeal to the Supreme Court signed by the Senior Circuit Judge issue.

By the Court: ARTHUR I. CHARRON,
Clerk.

Citation on Appeal.

(D. C. Form 147.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to John L. Bates, Receiver of The National City Bank of Cambridge, a national banking association, established and existing under the laws of the United States, in the city of Cambridge, Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the twenty-ninth day of June next, pursuant to an Appeal duly obtained from a decree of the United States Circuit Court of Appeals for the First Circuit, wherein Sumner Dresser, Administrator of the estate of Edwin Dresser, late of Cambridge, Massachusetts, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Senior Circuit Judge and a Judge of the United States Circuit Court of Appeals for the First Circuit, this first day of June, in the year of our Lord one thousand nine hundred and eighteen.

FREDERIC DODGE,
Senior Circuit Judge.

[Endorsed:] June 3, 1918. Service of the within citation is hereby accepted. John L. Bates, Receiver. By Frank N. Nay, William A. Kneeland, Solicitors.

United States Circuit Court of Appeals for the First Circuit, October Term, 1917.

No. 1266.

GEORGE W. GALE et al., Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

On January 2, 1917, the following Suggestion of Death and Motion of John M. Dean, Executor, for Permission to appear as Party were filed:—

Suggestion of Death of George W. Gale.

(Filed Jan. 2, 1917.)

ow comes John M. Dean, Executor of the will of George W. Gale, suggests to this Honorable Court that said George W. Gale, one he Appellants herein, died on or about the 29th day of July, 5.

By His Attorneys: ROBERT M. MORSE,
ALGER, DEAN & SULLIVAN.

ion of John M. Dean, Executor, for Permission to Appear as Party.

(Filed Jan. 2, 1918.

And now comes John M. Dean, of Brookline, in the County of folk, and Commonwealth of Massachusetts, and represents to this norable Court that he is the duly appointed Executor of the will George W. Gale, deceased, one of the Appellants herein, and prays t he may be allowed to become a party to said action to prosecute same as Executor of the will of said George W. Gale.

By His Attorneys: ROBERT M. MORSE,
ALGER, DEAN & SULLIVAN.

On the same day, to wit, January 2, 1917, the following Order of urt was entered:—

Order of Court.

January 2, 1917.

Upon motion of John M. Dean, Executor of the will of George W. le, one of the appellants, deceased, leave is hereby granted said hn M. Dean to appear and prosecute the cause herein as executor the will of said George W. Gale.

By the Court:

ARTHUR I. CHARRON,
Clerk.

This case came on to — heard March 20, 21, 22 and 23, 1917, together with Nos. 1265 and 1267 and was fully heard by the Court, norable Frederic Dodge, Circuit Judge, and Honorable Edgar drich and Honorable Arthur L. Brown, District Judges, sitting, d on March 22, 1917, the following Stipulations were filed:—

Stipulations.

(Filed March 22, 1917.

It is agreed that the witness Willard A. Bullard did not otherwise fix the time of his conversation with the appellant Barber, referred to by the Master at Page 88, and by District Court at pages 207 and 208, than by saying, as the master reports, that it was "about two or three months before the failure of the bank"; that he did not mention the month of November nor the name of any month as the time of the conversation; and that the statement at page 298 of the record that "Willard A. Bullard testified as found by the Court in the opinion, page 207" of the record, may be modified to read that he testified as found by the master at pages 88 and 89; and that Mr. Bullard died soon after giving his testimony.

It is further agreed that Frank L. Earle, the Cashier of the Bank, testified as follows:—

"Q. And then if there were discrepancies the first thing that was done that Mr. Coleman would read off the deposits from his books?

A. Yes, all the credits.

Q. Yes, and all credits?

A. Yes.

Q. And those would be checked with the pass book?

A. Yes.

Q. Now, after that was all done, were there any instances that you recall where there was any serious discrepancy?

A. Yes.

—. ——.

A. I don't recall anything that was large.

Q. Well, how large, for instance?

A. In the books that I came in contact with. Well, it might be anywhere from $10 to $100, but I don't recall any large amounts in my experience.

Q. And if there had been such you would have known it as cashier, wouldn't you?

A. Why, yes, it would have been reported to me, it was supposed to be. But those books, if there were any of that nature, didn't come to my attention at the time.

Q. Then those small discrepancies, did you run those down?

A. Most of them were errors in carrying forward the balances. And sometimes there were checks charged to the wrong accounts—very often that happened.

Q. Do you remember any instances where you were not able to detect the error?

—. No, I don't recall any books that came under my observation but what were finally balanced."

It is further agreed that the records of the annual meetings of the stockholders and the records of the Directors' Meetings from January 1, 1903, to the close of the bank may be referred to at the arguments.

That Earl was not a stockholder.

It is further agreed that the Depositors' Ledgers from 1906 to the close of the Bank; and the Cashier's Ledger from 1906 to the close of the Bank, may be referred to.

FRANK N. NAY,
Att'y for Receiver.
CLARENCE ALFRED BUNKER,
Att'y for John D. Hardy et al., Admrs.
ROBERT M. MORSE,
PAUL DUDLEY DEAN,
JOHN B. SULLIVAN, Jr.,
Att'y for Sumner Dresser, Sumner Dresser, Adm'r; John W. Dean, Executor.
ARTHUR P. FRENCH,
Att'y for David A. Barber.

Thereafter, to wit, on March 5, 1918, the Opinion of the Court (page 1) was announced, an Opinion by Brown, J., dissenting in part (page 28) was filed and the following Final Decree was entered:—

Final Decree.

March 5, 1917.

This case came on to be heard March 20, 21, 22 and 23, 1917, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, March 5, 1918, here ordered, adjudged and decreed as follows: The decree of the District Court, except as against Edwin Dresser's administrator, is reversed. The case is remanded to that court, with directions to dismiss the bill as against the other defendants, and to modify the decree against said administrator by reducing the damages awarded to the amount of Coleman's defalcations from December 1, 1908, to the close of the bank. So modified, said decree is affirmed. The appellants recover their costs of appeal.

By the Court:

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on March 6, 1918, motion to Amend Decree (page 47) was filed by the appellee, and a hearing was had on the motion to amend decree, Honorable Frederic Dodge, Circuit Judge, and Honorable Edgar Aldrich and Honorable Arthur L. Brown, District Judges, sitting.

Thereafter, to wit, on April 8, 1918, a memorandum opinion by direction of the Court, by Judge Aldrich, on motion to amend decree (page 39) was announced, and the following Order of Court was entered:—

Order of Court.

April 8, 1918.

It is ordered that appellee's motion to amend the decree of March 5, 1918, be, and the same hereby is, denied.

By the Court:

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, May 4, 1918, the following Motion to stay mandate was filed by the appellee:—

Motion to Stay Issue of Mandate.

(Filed May 4, 1918.)

Now comes John L. Bates, Receiver of the City National Bank of Cambridge, Appellee in the above-entitled action, and moves that the issue of the mandate to the United States District Court for the District of Massachusetts be stayed until further order of this Honorable Court on the grounds that said Appellee intends to prosecute an appeal to the Supreme Court of the United States.

JOHN L. BATES,
Receiver,
By FRANK N. NAY,
WILLIAM A. KNEELAND,
Solicitors.

Assented to:
A. E. PILLSBURY,
for Applt. Barber.
R. M. MORSE,
PAUL DUDLEY DEAN,
JOHN B. SULLIVAN,
Att'y Dresser & Dresser, Adm'r.

On the same day, to wit, on May 4, 1918, the following Order of Court was entered:—

Order of Court.

May 4, 1918.

Upon motion of appellee, assented to, It is ordered that the mandate herein be, and the same hereby is, stayed until further order of the court.

By the Court:

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, May 31, 1918, the following Petition for Appeal, Assignment of Errors and Bond on Appeal were filed by the appellee.

Petition for Appeal.

(Filed May 31, 1918.)

Now comes John L. Bates, Receiver, Appellee from this Court, by his Solicitor, and complains that in the record and proceedings, and also in the rendition of the decrees of this Court sitting at Boston, in the Commonwealth of Massachusetts, and in the above styled and numbered cause on the fifth day of March, 1918, reversing the decree of the United States District Court for the District of Massachusetts, in the said cause, to wit, the decree of February 1, 1916, and in the decree of this Court dated April 8, 1918, manifest error has intervened to the great damage of the petitioner; that the jurisdiction of said Circuit Court of Appeals and the said United States District Court depended upon the fact that the rights and responsibilities of directors of a national bank, and the construction of United States statutes concerning national banks, were involved, and that the said John L. Bates, petitioner, is Receiver of the National City Bank of Cambridge, Massachusetts, and sues in such capacity to hold certain directors of said Bank responsible for losses incurred by their negligence; that the matter involved in the litigation and the matters in controversy exceeds the sum of One Thousand Dollars ($1,000) besides costs, and that this is not a case in which the jurisdiction of said Circuit Court of Appeals is made final.

Wherefore, the petitioner, John L. Bates, Receiver of the National City Bank of Cambridge, Massachusetts, files herewith his assignment of errors and prays that an appeal to the Supreme Court of the United States may be allowed him for the reasons set forth in said assignment of errors, and that a citation may issue and a transcript of the records, proceedings and papers in the said cause upon which said decrees were made may be transmitted to the said Supreme Court of the United States. And petitioner also prays for any other and further process which may be required to perfect the appeal prayed for to the end that all errors may be corrected. And the said petitioner prays that the said decrees of the said Circuit Court of Appeals for the First Circuit, to wit, the decrees dated March 5, 1918, and April 8, 1918, may be reversed and that the said Circuit Court of Appeals for the First Circuit may be directed to enter a decree affirming the decree of the United States District Court for the District of Massachusetts, to wit, the decree of February 1, 1916, with costs and interest from that date.

JOHN L. BATES,
Receiver of the National City Bank of Cambridge, Massachusetts.
By FRANK N. NAY,
His Solicitor.

Allowed May 31, 1918.
FREDERIC DODGE,
U. S. Circuit Judge.

Assignment of Errors.

(Filed May 31, 1918.)

And now on this 31st day of May, 1918, comes John L. Bates, Receiver, Appellee in this Court, by his Solicitor, Frank N. Nay, and says the decrees entered in the above cause, to wit, on the fifth day of March, A. D. 1918, and on the eighth day of April, 1918, are erroneous and unjust to him, the said Receiver:

(1) Because the said Circuit Court of Appeals by said decree remanded the said cause to the United States District Court for this District, with directions to dismiss the bill in the above cause, as against the Appellants, thereby reversing the final decree of said District Court of February 1, 1916, which final decree of said United States District Court dated February 1, 1916, held the appellants liable to the said Receiver for the amount of the defalcations of one Coleman from September 30, 1907, to the close of the National City Bank, of which said John L. Bates is Receiver.

(2) Because the said Circuit Court of Appeals in its said decrees refused to allow the said Receiver any interest whatever on any amount from said February 1, 1916, or from any date.

(3) Because the said Circuit Court of Appeals in its decision filed with said decree of March 5, 1918, held that on the record in the case, George W. Gale, Sumner Dresser and David A. Barber, Appellants in this case, were guilty of no negligence upon which this action could be based, whereas the said Court should upon the record have held George W. Gale, Sumner Dresser, and David A. Barber responsible because of numerous other acts of negligence and omissions due to negligence, among others the following:

(*a*) In being a party to putting the deposit ledger of the bank in the sole charge of the said Coleman at a time when the said Coleman was less than eighteen years of age, except in the case of David A. Barber, and in permitting the same to remain in his sole charge with no effective supervision from said date until the close of the Bank.

(*b*) As Directors, in retaining said Coleman as such bookkeeper without ascertaining that he was making frequent and careless mistakes in his work.

(*c*) Except in the case of David A. Barber, in disregarding warnings of an auditor who examined the Bank in 1903 and 1904, concerning the importance of the deposit ledger being carefully and accurately kept.

(*d*) In being ignorant that the cashier was permitting the bookkeeper to open the envelopes received daily from the Boston Clearing House and remove the checks, the said cashier himself seldom, or never, seeing the checks thus coming into the Bank for payment.

(*e*) Except in the case of David A. Barber, in giving no weight to the fact that three successive tellers, the Bank employing but one teller who acted as both receiver and paying teller, were found short in their cash, all experienced men, all denying any responsibility

in the matter, while the arrangements of the Bank and the lack of a teller's cage made it apparent that some one else within the Bank might be the guilty party, and when, as a matter of fact, the said Coleman was, as appears on all the evidence, the party guilty of all said shortages.

(*f*) Except in the case of David A. Barber, in being a party to making the said Coleman paying and receiving teller, as well as bookkeeper, for a period of about twenty-five (25) months, during which period he began his stealings, and stole a large amount. The said Coleman being thus put in a position where it was easy for him to steal and to conceal his stealings by false entries in inactive accounts, and with almost no chance of detection.

(*g*) In assuming that the books examiners' necessarily rapid examinations of the Bank twice a year, when they knew, or should have known, that most of the time was spent by the examiner on loans and collateral, was the equivalent of an audit, having no just reason to make any such assumption, and, except in the case of David A. Barber, making this assumption in the face of the fact known to them that a real audit of the Bank made in 1903 and 1904 had taken seven or eight days' time of a competent auditor and at a time when the Bank had fewer accounts than during the time when the said Coleman was bookkeeper.

(*h*) In permitting numerous meetings of the directors to be omitted without adequate excuses.

(*i*) In disregarding, without any excuse, the express provision of the By-Law, which required semiannual examinations of the Bank by the directors and comparisons to ascertain if the books were correctly kept; whereas, if said examinations had been regularly held and the terms of the By-Laws, as set forth in the record, complied with, the said defalcations would have been discovered at an early stage, and the great bulk of the defalcations of the said Coleman prevented.

(*j*) In wholly failing to investigate and ascertain the cause of the apparent shrinkage of Bank's deposits from about $368,000 to about $107,000, this apparent shrinkage occurring during a period when no depositors were withdrawing accounts and when as a fact the real deposits of the Bank were actually increasing.

(*k*) In having no audit or careful examination of the Bank made from July, 1903, to February 21, 1910, the date the Bank closed its doors.

(*l*) Except in the case of David A. Barber, in permitting the said Coleman, then aged less than twenty, to have the combination of the cash box and actual access to the Bank's cash from about the time he became teller, later in 1905 or the very early part of 1906.

(*m*) In neither making, nor causing to be made, any investigations, whatever regarding the habit and methods of life of Coleman, a very young man to hold an important position in the Bank, and part of the time two important positions, and who as a $12.00 a week bookkeeper, was able to own a good automobile and run the same.

(4) In holding that Article 19 of the Bank's By-Laws might be wholly disregarded by the directors, as they did disregard it, and

that none of the directors were responsible for such disregard, said By-Law being as follows:—

"Sec. 19. There shall be appointed by the Board, every six months a Committee whose duty it shall be to examine into the affairs of the Bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books were correctly kept, and the condition of the Bank is in a sound and solvent condition; the result of which examination shall be reported to the Board at their next regular meeting."

And in holding that the By-Law imposed no special duty upon the directors, and that the same might be disregarded by them, no special reason tending to forbid such omission being shown, and in further holding that the directors' long continued practice of omitting to comply with the requirements of the said By-Law exonerates, or tends to exonerate them from failing to comply with its requirements.

(5) In holding that the very great apparent shrinkage in deposits was not of itself enough legally to require the directors and President of the Bank to be on their guard and to make a full investigation as to the causes thereof.

(6) In finding that the methods employed by Coleman in accomplishing and concealing his thefts were "ingenious and appear to have been altogether novel." Whereas stealing money as teller from his teller's cash was neither ingenious nor novel. And whereas making fictitious charges on the deposit ledger to depositors' accounts was neither ingenious nor novel. And whereas giving his own balance false credits upon the deposit ledger was neither ingenious nor novel. And whereas making false footings of the additions of columns on the deposit ledger was neither ingenious nor novel, the foregoing methods of concealing his stealings upon the book constituting, as appears by the record, almost all the falsifications of the deposit ledger as originally made to cover thefts from day to day, the other falsifications being, for the most part, made subsequently and to conceal thefts previously made and to put the books into condition to deceive the Bank examiners, and being likewise neither ingenious nor novel.

(7) In apparently holding that the fact that the National Bank examiners did not in their examinations detect anything wrong during the period of Coleman's stealings tends to exonerate all the directors; the said examinations having been made by representatives of the Comptroller of the Currency, for the purpose of giving him full information regarding the Bank, and not having been made for the benefit of the directors, no copies having been furnished them, and the directors, as a matter of law, not having been entitled to rely in any way upon such examinations as relieving them from their own duties and responsibilities.

(8) In holding, in effect, that the directors in failing to make or cause to be made a full examination of the Bank's condition from

time to time after September 30, 1907, were not guilty of negligence, and that the Master's finding on this point should have been confirmed by the District Court, whereas, as appears by the record, there was no dispute on the primary facts in the matter, and the District Court in reversing the Master on this question merely reached different conclusions on established facts, the rule in favor of the findings of a Master who has seen and heard the witnesses and must judge of their credibility on contested questions of facts, having no application.

(9) In allowing the said George W. Gale, Sumner Dresser and David A. Barber, to recover the costs of their appeal from said United States District Court to the United States Circuit Court of Appeals for the First Circuit, whereas, instead of the decrees appealed from, this Court should have entered a decree affirming the decree of February 1, 1916, entered by the United States District Court for the District of Massachusetts with interest and costs.

JOHN L. BATES,
Receiver, Plaintiff, and Appellee in This Court,
By FRANK N. NAY,
His Solicitor.

Bond on Appeal.

(Filed May 31, 1918.)

Know all men by these presents, That I, John L. Bates, Receiver of the City National Bank of Cambridge, Cambridge, Massachusetts, am held and firmly bound unto George W. Gale, of Brookline, Massachusetts, Sumner Dresser, of Brookline, Massachusetts, and David A. Barber of Cambridge, Massachusetts, in the full and just sum of Two Hundred and Fifty dollars ($250) to be paid to the said George W. Gale, Sumner Dresser and David A. Barber, their certain attorneys, executors, administrators, successors or assigns; to which payment, well and truly to be made, I bind myself, my successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with my seal and dated this 31st day of May in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at the Circuit Court of Appeals of the United States for the First Circuit in a suit in equity depending in said Court between George W. Gale, Sumner Dresser and David A. Barber, defendants, and John L. Bates, Receiver as plaintiff, a decree was ordered to be entered against the said John L. Bates, Receiver, as the plaintiff, and the said John L. Bates, Receiver, having obtained an appeal to remove said cause to the United States Supreme Court to reverse the decree so ordered in the aforesaid suit, and a citation directed to the said George W. Gale, Sumner Dresser and David A. Barber, as aforesaid citing and admonishing them to be and appear in the said United States Supreme Court in the city of Washington, District of Columbia, on the 29th day of June, 1918.

Now, the condition of the above obligation is such, That if the said John L. Bates, Receiver, shall prosecute his said appeal to effect, and answer all costs against him if he fail to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

JOHN L. BATES. [SEAL.]

Signed and delivered in presence of
W. A. KNEELAND.

(Endorsed:) Assented to. A. E. Pillsbury, Robert M. Morse, Paul Dudley Dean, John B. Sullivan, Jr., for George W. Gale & Sumner Dresser.

On the same day, to wit, May 31, 1918, the following Order of Court was entered:

Order of Court.

May 31, 1918.

Appellee's bond with approval endorsed thereon having been filed. It is ordered that citation on appeal to the Supreme Court signed by the Senior Circuit Judge issue.

By the Court: ARTHUR I. CHARRON,
Clerk.

(D. C. Form 147.)

Citation on Appeal.

UNITED STATES OF AMERICA, *ss.:*

The President of the United States, To John M. Dean, of Brookline, Executor under the will of George W. Gale, late of Brookline, Sumner Dresser, of Brookline and David A. Barber, of Cambridge, all residing within the District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the twenty-ninth day of June next, pursuant to an Appeal duly obtained from a decree of the United States Circuit Court of Appeals for the First Circuit, wherein John L. Bates, Receiver of The National City Bank of Cambridge, a national banking association, established and existing under the laws of the United States in the city of Cambridge, Massachusetts, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Senior Circuit Judge and a Judge of the United States Circuit Court of Appeals for the

First Circuit, this thirty-first day of May, in the year of our Lord one thousand nine hundred and eighteen.

FREDERIC DODGE,
Senior Circuit Judge.

JUNE 3, 1918.

Service of the within citation is hereby accepted.

JOHN M. DEAN,
Executor u/w of George W. Gale and Sumner Dresser,
By PAUL DUDLEY DEAN,
JOHN B. SULLIVAN, JR.,
Solicitors.
A. E. PILLSBURY,
For Appellee Barber.

United States Circuit Court of Appeals for the First Circuit.
October Term, 1917.

No. 1267.

CLARENCE ALFRED BUNKER et al., Administrators, Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

On March 20, 21, 22 and 23, 1917, this case came on to be heard together with Nos. 1265 and 1266, and were fully argued by the court, Honorable Frederic Dodge, Circuit Judge, and Honorable Edgar Aldrich and Honorable Arthur L. Brown, District Judges, sitting.

Thereafter, to wit, on March 5, 1918, the Opinion of the Court (page 1) was announced, an Opinion by Brown, J., dissenting in part (page 28) was filed and the following Final Decree was entered:

Final Decree.

(Filed March 5, 1918.)

This case came on to — heard March 20, 21, 22 and 23, 1917, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, March 5, 1918, here ordered, adjudged and decreed as follows: The decree of the District Court, except as against Edwin Dresser's administrator, is reversed. The case is remanded to that court, with directions to dismiss the bill as against the other defendants, and to modify the decree against said administrator by reducing the damages awarded to the amount

of Coleman's defalcations from December 1, 1908, to the close of the bank. So modified, said decree is affirmed. The appellants recover their costs of appeal.

By the Court: ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on March 6, 1918, a Motion to Amend Decree (page 47) was filed.

Thereafter, to wit, on March 28, 1918, a hearing was had on the motion to amend the decree, Honorable Frederic Dodge, Circuit Judge, the Honorable Edgar Aldrich and Honorable Arthur L. Brown, District Judges, sitting.

Thereafter, to wit, on April 8, 1918, a memorandum opinion by direction of the Court, by Judge Aldrich, on motion to amend decree (page 39) was announced and the following Order of Court was entered:

Order of Court.

April 8, 1918.

It is ordered that appellee's motion to amend the decree of March 5, 1918, be, and the same hereby is denied.

By the Court:
ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on May 4, 1918, the following Motion to Stay Mandate was filed by the Appellee:

Motion to Stay Issue of Mandate.

(Filed May 4, 1918.)

Now comes John L. Bates, Receiver of the City National Bank of Cambridge, Appellee in the above-entitled action, and moves that the issue of the mandate to the United States District Court for the District of Massachusetts be stayed until further order of this Honorable Court on the grounds that said Appellee intends to prosecute an appeal to the Supreme Court of the United States.

JOHN L. BATES,
Receiver.
By FRANK N. NAY,
WILLIAM A. KNEELAND,
Solicitors.

Assented to:
CLARENCE ALFRED BUNKER,
For Self & Co-Appellant.

On the same day, to wit, May 4, 1918, the following Order of Court was entered:

Order of Court.

May 4, 1918.

Upon motion of appellee, assented to, It is ordered that the mandate herein be, and the same hereby is, stayed until further order of the court.

By the Court:

ARTHUR L. CHARRON,
Clerk.

Thereafter, to wit, on May 31, 1918, the following Petition for Appeal, Assignment of Errors and Bond on Appeal were filed by the Appellee:

Petition for Appeal.

(Filed May 31, 1918.)

Now comes John L. Bates, Receiver, Appellee from this Court, by his Solicitor, and complains that in the record and proceedings, and also in the rendition of the decrees of this Court sitting at Boston, in the Commonwealth of Massachusetts, and in the above styled and numbered cause on the fifth day of March, 1918, reversing the decree of the United States District Court for the District of Massachusetts, in the said cause, to wit, the decree of February 1, 1916, and in the decree of this Court dated April 8, 1918, manifest error has intervened to the great damage of the petitioner; that the jurisdiction of said Circuit Court of Appeals and the said United States District Court depended upon the fact that the rights and responsibilities of directors of a national bank, and the construction of United States Statutes concerning national banks, were involved, and that the said John L. Bates, petitioner, is Receiver of the National City Bank of Cambridge, Massachusetts, and sues in such capacity to hold certain directors of said Bank responsible for losses incurred by their negligence; that the matter involved in the litigation and that matters in controversy exceeds the sum of One Thousand Dollars ($1,000) besides costs, and that this is not a case in which the jurisdiction of said Circuit Court of Appeals is made final.

Wherefore, the petitioner, John L. Bates, Receiver of the National City Bank of Cambridge, Massachusetts, files herewith his assignment of errors and prays that an appeal to the Supreme Court of the United States may be allowed him for the reasons set forth in said assignment of errors, and that a citation may issue and a transcript of the record, proceedings and papers in the said cause upon which said decrees were made may be transmitted to the said Supreme Court of the United States. And petitioner also prays for

any other and further process which may be required to perfect the appeal prayed for to the end that all errors may be corrected. And the said petitioner prays that the said decrees of the said Circuit Court of Appeals for the First Circuit, to wit, the decrees dated March 5, 1918, and April 8, 1918, may be reversed and that the said Circuit Court of Appeals for the First Circuit may be directed to enter a decree affirming the decree of the United States District Court for the District of Massachusetts, to wit, the decree of February 1, 1916, with costs and interest from that date.

JOHN L. BATES,
Receiver of the National City Bank of Cambridge, Massachusetts.
By FRANK N. NAY,
His Solicitor.

Allowed May 31, 1918.
FREDERIC DODGE,
U. S. Circuit Judge.

Assignment of Errors.

(Filed May 31, 1918.)

And now on this 31st day of May, 1918, comes John L. Bates, Receiver, Appellee in this Court, by his Solicitor, Frank N. Nay, and says the decrees entered in the above cause, to wit, on the fifth day of March, A. D. 1918, and on the eighth day of April, 1918, are erroneous and unjust to him, the said Receiver:

(1) Because the said Circuit Court of Appeals by said decree remanded the said cause to the United States District Court for this District, with directions to dismiss the bill in the above cause, as against the Appellants, administrators as aforesaid, thereby reversing the final decree of said District Court dated February 1, 1916, which final decree of said United States District Court dated February 1, 1916, held the appellants, administrators as aforesaid, liable to the said Receiver for the amount of the defalcations of one Coleman from September 30, 1907, to the close of the National City Bank, of which said John L. Bates is Receiver.

(2) Because the said Circuit Court of Appeals in its said decrees refused to allow the said Receiver any interest whatever on any amount from said February 1, 1916, or from any date.

(3) Because the said Circuit Court of Appeals in its decision filed with said decree of March 5, 1918, held that on the record in the case, George E. Richardson, the intestate of Clarence A. Bunker et als., Appellants in this case, was guilty of no negligence upon which this action could be based, whereas the said Court should upon the record have held the said estate of George E. Richardson responsible because of numerous other acts of negligence and omissions due to negligence, among others, the following:

(*a*) In being a director of the bank, knowing it was out of the

uestion that he would be able to attend its directors' meetings, with ny regularity, and in rarely attending directors' meetings.

(*b*) In permitting the deposit ledger of the bank to remain in he sole charge of said Coleman, with no effective supervision from he time it was first placed in his charge until the close of the bank.

(*c*) As Director, in retaining said Coleman as such bookkeeper ithout ascertaining that he was making frequent and careless mis-ikes in his work.

(*d*) In being ignorant that the cashier was permitting the book-eeper to open the envelopes received daily from the Boston Clearing Iouse and remove the checks, the said cashier himself seldom, or ever, seeing the checks thus coming into the bank for payment.

(*e*) In assuming that the *books* examiners' necessarily rapid xaminations of the Bank twice a year, when he knew, or should ave known, that most of the time was spent by the examiner on oans and collateral, was the equivalent of an audit, having no just eason to make any such assumption.

(*f*) In permitting numerous meetings of the directors to be nitted without adequate excuses.

(*g*) In disregarding, without any excuse, the express provision f the By-Law, which required semiannual examinations of the Bank y the directors and comparisons to ascertain if the books were cor-ectly kept; whereas, if said examinations had been regularly held nd the terms of the By-Laws, as set forth in the record, complied ith, the said defalcations would have been discovered at an early tage, and the great bulk of the defalcations of the said Coleman revented.

(*h*) In wholly failing to investigate and ascertain the causes of he apparent shrinkage of the Bank's deposits from about $368,000 o about $107,000, this apparent shrinkage occurring during a period hen no depositors were withdrawing accounts and when as a fact he real deposits of the Bank were actually increasing.

(*i*) In having no audit or careful examination of the Bank made rom the time he became director, to February 21, 1910, the date he Bank closed its doors.

(*j*) In neither making, nor causing to be made, any investiga-ons, whatever regarding the habit and methods of life of Coleman, very young man to hold an important position in the Bank, and art of the time two important positions, and who as a $12.00 a week ookkeeper, was able to own a good automobile and run the same.

(4) In holding that Article 19 of the Bank's By-Laws might be holly disregarded by the directors, as they did disregard it, and hat none of the directors were responsible for such disregard, said y-Law being as follows:—

"Sec. 19. There shall be appointed by the Board, every six onths a Committee whose duty it shall be to examine into the ffairs of the Bank, to count its cash, and compare its assets and abilities with the balances on the general ledger, for the purpose f ascertaining whether or not the books are correctly kept, and the ondition of the Bank is in a sound and solvent condition; the re-

sult of which examination shall be reported to the Board at their next regular meeting."

And holding that the By-Law imposed no special duty upon the directors, and the same might be disregarded by them, no special reason tending to forbid such omission being shown, and in further holding that the directors' long continued practice of omitting to comply with the requirements of the said By-Law exonerates, or tends to exonerate, them from failing to comply with its requirements.

(5) In holding that the very great apparent shrinkage in deposits was not of itself enough legally to require the directors and President of the Bank to be on their guard and to make a full investigation as to the causes thereof.

(6) In finding that the methods employed by Coleman in accomplishing and concealing his thefts were "ingenious and appear to have been altogether novel." Whereas stealing money as a teller from his teller's cash was neither ingenious nor novel. And whereas making fictitious charges on the deposit ledger to depositors' accounts was neither ingenious nor novel. And whereas giving his own balance false credits upon the deposit ledger was neither ingenious nor novel. And whereas making false footings of the additions of the columns on the deposit ledger was neither ingenious nor novel, the foregoing methods of concealing his stealings upon the book constituting, as appears by the record almost all the falsifications of the deposit ledger as originally made to cover thefts from day to day, the other falsifications being, for the most part, made subsequently and to conceal thefts previously made and to put the books into condition to deceive the Bank examiners, and being likewise neither ingenious nor novel.

(7) In apparently holding that the fact that the National Bank examiners did not in their examinations detect anything wrong during the period of Coleman's stealings tends to exonerate all the directors; the said examinations having been made by representatives of the Comptroller of the Currency, for the purpose of giving him full information regarding the Bank, and not having been made for the benefit of the directors, no copies having been furnished them, and the directors, as matter of law, not having been entitled to rely in any way upon such examination as relieving them from their own duties and responsibilities.

(8) In holding, in effect, that the directors in failing to make or cause to be made full examination of the Bank's condition from time to time after September 30, 1907, were not guilty of negligence, and that the Master's finding on this point should have been confirmed by the District Court, whereas, as appears by the record, there was no dispute on the primary facts in the matter, and the District Court in reversing the Master on this question merely reached different conclusions on established facts, the rule in favor of the findings of a Master who has seen and heard the witnesses and must judge of their credibility on contested questions of facts, having no application.

(9) In allowing the said Clarence A. Bunker et als., administrators, to recover the costs of their appeal from said United States District Court to the United States Circuit Court of Appeals for the First Circuit, whereas, instead of the decrees appealed from, this Court should have entered a decree affirming the decree of February 1, 1916, entered by the United States District Court for the District of Massachusetts, with interest and costs.

JOHN L. BATES,
Receiver, Plaintiff and Appellee in This Court.
By FRANK N. NAY,
His Solicitor.

Bond on Appeal.

(Filed May 31, 1918.)

Know all men by these presents, That I, John L. Bates, Receiver of the City National Bank of Cambridge, Cambridge, Massachusetts, am held and firmly bound unto Clarence Alfred Bunker and John D. Hardy, both of Wellesley, Massachusetts, as administrators under the will annexed of the estate of George E. Richardson, in the full and just sum of Two Hundred and Fifty Dollars ($250) to be paid to the said Clarence Alfred Bunker and John D. Hardy, administrators aforesaid, their certain attorneys, executors, administrators, successors or assigns; to which payment, well and truly to be made, I bind myself, my successors, heirs, executors and administrators, jointly and severally, by these presents. Sealed with my seal and dated this 31st day of May in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at the Circuit Court of Appeals of the United States for the First Circuit in a suit in equity depending in said Court between Clarence Alfred Bunker et al., administrators as aforesaid, defendants, and John L. Bates, Receiver, plaintiff, a decree was ordered to be entered against the said John L. Bates, Receiver, as the plaintiff and the said John L. Bates, Receiver, having obtained an appeal to remove said cause to the United States Supreme Court to reverse the decree so ordered in the aforesaid suit, and a citation directed to the said Clarence Alfred Bunker and John D. Hardy, as administrators, as aforesaid citing and admonishing them to be and appear in the said United States Supreme Court in the city of Washington, District of Columbia, on the 29th day of June, 1918.

Now the condition of the above obligation is such, That if the said John L. Bates, Receiver, shall prosecute his said appeal to effect, and answer all costs against him if he fail to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

JOHN L. BATES. [SEAL.]

Sealed and delivered in presence of
W. A. KNEELAND.

(Endorsed:) Within bond is acceptable. Clarence Alfred Bunker, for self & co-defendant.

On the same day, to wit, May 31, 1918, the following Order of Court was entered:—

Order of Court.

May 31, 1918.

Appellee's bond with approval endorsed thereon having been filed, It is ordered that citation on appeal to the Supreme Court signed by the Senior Circuit Judge issue.

By the Court:

ARTHUR I. CHARRON,
Clerk.

(D. C. Form 147.)

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Clarence Alfred Bunker and John D. Hardy, Administrators, C. T. A. Estate of George E. Richardson, late of Wellesley, Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the twenty-ninth day of June next, pursuant to an Appeal duly obtained from a decree of the United States Circuit Court of Appeals for the First Circuit, wherein John L. Bates, Receiver of The National City Bank of Cambridge, a national banking association, established and existing under the laws of the United States in the city of Cambridge, Massachusetts, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, Senior Circuit Judge and a Judge of the United States Circuit Court of Appeals for the First Circuit, this thirty-first day of May, in the year of our Lord one thousand nine hundred and eighteen.

FREDERIC DODGE,
Senior Circuit Judge.

JUNE 3, 1918.

Service of the within citation is hereby accepted.

CLARENCE ALFRED BUNKER,
For Self & Co-Administrator.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify, that the four volumes, entitled as follows:

Volume I., Pleadings and Testimony before Master, Part 1;
Volume II., Testimony before Master, Part 2;
Volume III., Testimony before Master, Part 3, and Exhibits;
Volume IV., Proceedings in Circuit Court of Appeals;

(this same certificate being attached to each of said volumes) contain and are a true copy of the record and all proceedings of said Circuit Court of Appeals in the causes entitled,

No. 1265.

SUMNER DRESSER, Administrator, Defendant, Appellant,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

No. 1266.

GEORGE W. GALE et al., Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

No. 1267.

CLARENCE ALFRED BUNKER et al., Administrators, Defendants, Appellants,

v.

JOHN L. BATES, Receiver, Plaintiff, Appellee.

in said Circuit Court of Appeals determined, the Petitions for Appeal, the Assignments of Error, the Bonds on Appeal and also the original Citations issued upon the appeals of Sumner Dresser, Administrator, Defendant, Appellant, and John L. Bates, Receiver, Plaintiff, Appellee, in said causes with acknowledgments of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this fourteenth day of June, A. D. 1918.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

Endorsed on cover: File No. 26,624. U. S. Circuit Court of Appeals, First Circuit. Term No. 538. John L. Bates, Receiver of The National City Bank of Cambridge, Massachusetts, vs. Sumner Dresser, Administrator of the estate of Edwin Dresser, deceased, Appellant.

File No. 26,625. Term No. 539. Sumner Dresser, Administrator of the estate of Edwin Dresser, deceased, Appellant, vs. John L. Bates, Receiver of The National City Bank of Cambridge, Massachusetts.

File No. 26,626. Term No. 540. John L. Bates, Receiver of The National City Bank of Cambridge, Massachusetts, Appellant, vs. John M. Dean, Executor of George W. Gale, deceased, Sumner Dresser and David A. Barber.

File No. 26,627. Term No. 541. John L. Bates, Receiver of The National City Bank of Cambridge, Massachusetts, Appellant, vs. Clarence Alfred Bunker and John D. Hardy, Administrators, etc., of George E. Richardson, deceased.

Filed June 28th, 1918. (File Nos. 26,624 to 26,627.)

Supreme Court of the United States

October Term, 1894.

No. 197.

JOHN L. HAYES, RECEIVER OF THE NATIONAL CITY BANK OF CAMBRIDGE, MASS.,

Appellant,

v.

JOHN M. DEAN, EXECUTOR, SUMNER DEXTER, AND DAVID A. HARRIS,

Appellees.

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Supreme Court of the United States.

October Term, 1919.

No. 157.

JOHN L. BATES, Receiver of the National City Bank of Cambridge, Mass., *Appellant*,

v.

JOHN M. DEAN, Executor, SUMNER DRESSER, and DAVID A. BARBER.

Brief of the Appellee David A. Barber.

(All references are to volume and page of the printed record unless otherwise designated.)

Statement of the Case.

The peculiarity of the case warrants a brief statement by this appellee.

Reduced to its essence, it is an attempt by a receiver of a national bank to hold the directors liable for negligence in not suspecting or divining at the right time that an employee was secretly robbing the bank.

As such the receiver's suit is without precedent or anything resembling it in the books. It seeks to charge the directors with a liability exceeding $300,000 to make good losses to the bank by theft because they did not seasonably find out that the bookkeeper had devised a new and ingenious scheme of peculation, never

discovered or suspected by the executive officers of the bank under whose eyes he worked or by the national bank examiners, which scheme, by hoodwinking the cashier, he contrived to carry on for three years and until the bank was made insolvent.

The scheme, in brief, was this: Coleman, the bookkeeper, kept a small deposit account in the bank, and from time to time, beginning in 1906 or early in 1907, drew checks upon this account largely exceeding his deposit, which he exchanged with a broker in Boston for the broker's checks, getting these cashed for himself at the Boston bank on which they were drawn, the broker meantime depositing Coleman's check in his own Boston bank. When Coleman's check with all others on his own bank was returned to it from the Boston clearing-house on the day following its deposit, he took the clearing-house envelope from the mail, as the cashier allowed him to do, opened it, abstracted and suppressed his own check, made the proper disposition of all others, and covered the amount of his own by false entries or forced balances in the depositors' ledger, of which he had the charge and keeping. The cashier paid to the clearing-house each day, without question, the amount called for by its slip as checked by Coleman, and the bank thus lost, in each case, the amount of Coleman's check.

The executive and working force of the bank consisted only of the president, the cashier, a single teller, who handled the cash, a single bookkeeper—Coleman himself—and a messenger. The scheme depended wholly for its success upon the facts that Coleman was the only bookkeeper, having sole charge of the depositors' ledger, and had completely secured the cashier's

nfidence. Thus he was allowed to handle the clear-
g-house envelope and the returned checks and slips,
d the cashier usually took his word for what the
positors' ledger showed; or, if special occasion arose
r particular inquiry, Coleman was always alert and
ady with some device to deceive him and cover his
n fraud. By such arts he was able to escape detec-
n by the president, the cashier, or the national bank
aminers in six successive semi-annual examinations
the bank, until February 21, 1910, when his de-
lcations had amounted to $310,000 and were exposed
experts who came (in Coleman's absence) to ex-
nine the books of this bank with a view to its pur-
ase.

Barber's answer (I, 13-19) denies all negligence,
ers that the executive officers of the bank, and not
e directors, were lawfully in conduct of its business,
nies that he had any executive duties in the bank or
y duty to personally examine the books or papers,
ers due diligence in the performance of all duties
quired of him in his office of director, that he law-
lly relied upon the executive officers for proper per-
rmance of their duties and had no notice of their
fault, and reasonably relied upon the favorable re-
rts of the national bank examiners and was de-
ived and misled thereby.

Under a consent order the case was heard at great
ngth by a special master, of judicial experience, be-
re whom Coleman and all the officers of the bank
stified orally, Coleman being under examination for
xteen days. The bulk of the evidence was by Cole-
an and the receiver's expert accountant, who had
e books of the bank under examination between

seven and eight months (III, 1127) with the benefit of Coleman's disclosures, and presented in evidence a complete history and analysis of the fraud and exhibit of the fraudulent entries in the deposit ledgers as they were when the bank stopped.

The master, in an elaborate report, found in substance that the directors had no occasion to suspect crime in the bank, that neither of them was sufficiently skilled in bank accounting or methods to discover or unravel such a scheme of fraud as Coleman's, nor guilty of negligence in not discovering it, and found generally for all the defendants. (I, 29-102.)

The case was heard in the District Court upon the master's report, the receiver's 106 exceptions, and the reported evidence. The court practically ignored the report and the exceptions, no one of which was specifically sustained or overruled, took up the case *de novo* upon the evidence, wrote in effect a new master's report, and, in the light of the accountant's evidence of what had been discovered by his extended examination of the books after the exposure, assisted by the evidence of Coleman, who testified fully to all the particulars of the fraud, made these findings:

1. That all the defendants were alike negligent in not examining the bank twice a year, including a personal examination by themselves of the depositors' ledger, and that, if they had done so *September 30, 1907*, they would have discovered the fraud. (I. 208-209.)

2. That they were all alike negligent in September, 1909, when looking for the cause of apparent shrinkage of the deposits, in not calling for and personally examining the returned checks and slips of the cur-

rent month then in the bank, and that, if they had done so, they would have discovered the fraud. (I, 209.)

(There was also a special finding against the president, Edwin Dresser, involved in the cases Nos. 155 and 156 to be argued herewith but not concerning this appellee, and a special finding against him the reversal of which by the Court of Appeals (IV, 1665) is not now assigned or specified by the appellant as error and calls, under rule 21, for no further notice.)

Upon the general findings 1 and 2 the District Court held that all the defendants were alike liable for the whole amount of the defalcation after September 30, 1907, and made a decree against them all for that amount, being $283,218, with costs. (I, 172.)

(It is now inconsequential, but is true, that the first of these findings is *insufficient in law* to sustain a decree against the defendants or either of them, as there is not a shadow of a reason for holding that the directors were under obligation to examine the bank *on that particular day*, September, 30, 1907, whatever their general obligations may have been. The receiver's brief, at p. 194, admits this.)

Upon the appeals of the defendants the Circuit Court of Appeals re-examined the evidence, found that it did not sustain the conclusions of the District Court, reversed its decree, and ordered the bill dismissed as against all the defendants except the president Edwin Dresser, then deceased, against whose estate a majority of the court, on special grounds not involving the other defendants, affirmed the decree of the District Court modified to a less amount. (IV, 1647-1665, 1676.)

(The receiver's brief, at p. 3 and thereafter, mis-

states the attitude of the Court of Appeals, calling the opinion of the court, delivered by DODGE, J. (IV, 1647), which reversed the District Court and ordered the bill dismissed as against all the defendants except Edwin Dresser, a "majority opinion," whereas it was unanimous. The error persists throughout the brief, passages being quoted as from "the majority opinion" in which all the judges concurred. The only "majority opinion" was that part (by DODGE and ALDRICH, JJ., IV, 1657-1661) holding Edwin Dresser's estate liable, from which alone Judge BROWN dissented. (IV, 1666.))

Dresser's administrator having filed notice April 30, 1918, of appeal from this decree (IV, 1678), the receiver responded four days later, May 4, by notice of a cross-appeal against him and appeals against all the other defendants (IV, 1694, 1702); these being the appeals now before the court.

The master found, without exception or question, that the directors, though not accountants or familiar with bank bookkeeping or details, were business men competent to deal with the questions usually coming before bank directors, and that (apart from failure to discover Coleman's fraud) there was no failure or incompetency on their part in the general management of the bank. (I, 80, 81.) Accordingly, the single question presented by the appeal in this case, No. 157, so far as it concerns the appellee Barber, is whether the Court of Appeals erred in holding that he is not to be penalized in the sum of $283,218 because he did not find out that Coleman was stealing from the bank.

Neither the master nor either court below directly found the cashier to be incompetent or negligent—indeed there was no question of his competent qualifica-

tions; the master's finding that the directors were not negligent in employing him (I, 92, 93) was concurred in by the District Court (I, 210); the master's refusal to find that they were negligent in retaining him (I, 92, 93, 96) was not reversed nor any contrary finding made by either court below (I, 210; IV, 1649, 1650), nor can it be, as there is no evidence and no claim that Barber or any director ever had notice of negligence on his part. His integrity is unquestioned, and he was found by the master, unreversed, to be justified in trusting Coleman. (I, 90, 91, 96.)

So far as the appellee Barber is concerned, a fundamental error of the decree of the District Court, reversed and corrected by the decree of the Court of Appeals now appealed from by the receiver, was *in holding him bound to understand and to perform purely executive duties which the law does not require a director to understand or perform, which Barber had not the expert knowledge to understand or perform, and for the proper performance of which he had, in the absence of notice to the contrary, a legal right to rely on the executive officers to whom these duties belong.* There were other vital errors, but this is enough to show that the Court of Appeals did not err in reversing that decree.

Brief of the Argument.

I.

Barber's Position in Fact.

These facts are uncontroverted:

All the directors, though not accountants or familiar with bank bookkeeping or details, were business men

competent to deal with the questions usually coming before bank directors, and there was (apart from their failure to discover Coleman's crime) no failure or incompetency on their part in the general management of the bank. (Master's finding, unexcepted to and unreversed, I, 80, 81.)

Barber came into the board in January, 1907, reluctantly in view of his unfamiliarity with banking, at the urgent request of the president, who arranged for his purchase of the qualifying ten shares of stock; never having any previous connection with a bank except as a depositor. (I, 32, 80; III, 1267, 1268, 1269.) He never held any executive office in the bank, and *was never appointed upon any committee of the directors, to examine the bank or for any other purpose.*

He had no part in creating the situation into which he came and which continued throughout the defalcation. Edwin Dresser, one of the largest stockholders and depositors (I, 322), had long been a director and president, Gale and Sumner Dresser had been in the board for years, Earl was cashier, Coleman, then acting also as teller, was the bookkeeper, and had already begun his peculations. Barber had no previous acquaintance with any of them except as a depositor in the bank. (I, 32, 33; III, 1269.)

Barber was the least skilled or experienced member of the board; a mechanic by trade, manufacturing piano-forte actions, unfamiliar with bank bookkeeping or accounting or the internal details of bank business or methods. The master finds (without exception) that he was "successful in his own business and competent in the bank to deal with and pass upon the business questions that usually come before directors," but that

ıe "could not, in all probability, successfully have nade an examination of such a book as the depositors' edger." (I, 98.) He had in fact no knowledge of the ooks or their contents, never looking at or into any of them except once to check up the stock-book at the resident's request at an examination. (I, 80, 98; ee also I, 328; III, 1267, 1269, 1271, 1272, 1276.)

He was exceptionally diligent in attendance at direc-ors' meetings, never having missed one unless absent rom home, and, in all service assigned him, undertak-ng to do everything that belonged to him as a director o do and doing it "the best I knew how." (I, 65, 66; II, 1269, 1270.)

He was under every inducement to give as diligent ttention to the affairs of the bank as to his own, as he business of the bank *was* his own so far as his noney was at stake in it. He carried, and lost by the ailure, one of the largest accounts in the bank, having bout $26,413 on deposit at the end. (I, 322, 444, 456; II, 1268, 1269.)

As a new-comer in the bank, unfamiliar with the usiness, he did not take upon himself to suggest nethods or initiate measures, relying for this upon his nore experienced seniors and superiors. (III, 1271, 272, 1277, 1278, 1282, 1284.)

He never was told of the method of dealing with the hecks and slips returned from the clearing-house, ever heard of any error or irregularity in the books, ever understood or was given to understand that it as any part of his duty to examine them, never heard nything against Coleman's character or reputation ntil the final exposure, never knew anything of the ashier before he came into the bank nor had any rea-

son to doubt his competence or diligence, never heard of Wright's audit, or his letter, or the trouble with previous tellers (all this having occurred before he came into the board), or the Fillmore affair, or the Lombard letter. (I, 80, 95; III, 1270, 1271, 1276, 1277, 1281.)

He knew of the semi-annual examinations of the bank by the national bank examiners, and that their reports were always favorable (I, 334), and especially the president told him in November, 1909, that the examiner had given the bank "a clean bill of health"; and he gave credit to the reports of the examiners as confirming the sound condition of the bank. (III, 1276.)

He did not know the length of time employed in their examinations, nor that it was short or limited, nor how long it would take to make a complete audit, nor what the examiners' instructions were, nor that they were forbidden to verify the deposits. (I, 84; III, 1281.)

He knew, and it was well known in the bank, that Coleman had a connection with an automobile company, kept an account in the bank for them, and was selling their cars on commission, and Barber bought one of him. (I, 338, 339.) He knew that Coleman used a car, but never knew that he owned it. (I, 79, 84; III, 1270, 1271, 1277.) (The receiver's brief, p. 67, suppresses these facts, though needlessly, as it is not claimed, and there is no evidence, that Coleman's automobile was the cause of his peculations, and the master found accordingly, without exception. (I, 79.) Neither is it shown that the Kissell Kar Company ever profited by Coleman's frauds, as asserted in the receiver's brief at pp. 150, 151.)

In September, 1909, as soon as the apparent shrinkage of deposits began to be noticed, Barber personally called on the cashier for a statement of deposits for the last three or four years, and the cashier gave him a statement of them for five years down to date, which showed no marked or excessive current shrinkage. It showed the average deposits of 1909 down to September to exceed those of 1906 and to be but $10,000 to $15,000 below those of 1907 and 1908, and was rather reassuring than alarming. (III, 1272, 1273, 1274, 1283.)

When the shrinkage was brought up in the directors' meeting Barber asked the president how he accounted for it and was told that large depositors were withdrawing. The cashier remarked that Barber's own account had dropped off. Barber challenged this statement; the cashier went out and examined Coleman's ledger, returned, and said that it was all right; that Coleman had neglected to carry out his balances, or footings. (III, 1275, 1276.)

He was given to understand by the president and by the cashier at various times after the shrinkage was noticed that other Cambridge banks were getting deposits away from this bank. (III, 1272.)

He found in the newspapers statements, purporting to be official, from Washington, of large falling off in the deposits of the national banks of the country in November and December, which indicated to him that the shrinkage of deposits in the City Bank was not exceptional. (III, 1284, 1285.)

II.

Barber's Position in Law.

The directors are not liable as a board or jointly. No director is liable for the negligence of another, nor unless his own negligence is proved to have contributed to the loss, and this is to be determined upon the facts affecting each by himself. Knowledge of the contents of the books and papers is not imputable to the directors, nor are they held to insure the fidelity of employees, who are agents of the bank, not of the directors. All the cases are in accord to this effect, and need not be cited.

III.

The National Bank Act.

The National Bank Act, U.S. Comp. Sts. vol. 9, title 62, in sec. 9683, prescribes that the affairs of the bank "shall be managed by not less than five directors," who, by sec. 9661, clause fifth, may appoint a president, cashier, and other officers, and define their duties; and, by clause seventh, that the bank may exercise by its directors "*or by duly authorized officers or agents,* subject to law, all such incidental powers as shall be necessary to carry on the business of banking."

The Act thus expressly recognizes the distinction between general management, which belongs to the directors, and the actual conduct of the business, which, under this express authority, may be and in fact universally is delegated to the executive staff. It assigns no specific duties to the directors in the conduct of the business, and does not farther define the duty or liability of a director except by secs. 9685 and 9831.

By the terms of sec. 9685 the official oath, which the court takes as illustrative of his duty (*Briggs* v. *Spaulding*, 141 U.S., at 144, 146; *Yates* v. *Jones National Bank*, 206 U.S., at 174, 178), he undertakes "that he will, *so far as the duty devolves on him*, diligently and honestly administer the affairs of the Association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title."

This section again marks the distinction between general administrative duty, which does, and executive duties, which do not, devolve upon a director. See *Briggs* v. *Spaulding, ubi supra.* In respect of his liability it follows sec. 9831, which defines the only liability expressly attached by the Act to the office of director, which is only for *knowingly* violating or *willingly* permitting violation of the express provisions of the Act.

If this does not by implication exclude any other liability, which might be argued with much force if it were a new question, at least it points to a rule of diligence much less strict than that which the District Court applied in the present instance, for which there is no precedent or authority in any other reported case.

In any view of the subject, a director's common-law liability cannot properly be extended by construction beyond that which he has impliedly undertaken under the terms of sec. 9685—to diligently and honestly administer the affairs of the bank "*so far as the duty devolves on him.*" The leading cases hereinafter cited expressly recognize this.

There is nothing in the Act charging a mere director, as such, with any *executive* duties, or with the

actual conduct of the business or any part of it, or with any details of inside administration. And, apart from the Act, it is settled by the cases hereinafter cited that the responsibility for these is upon the executive officers, and that in the absence of notice to the contrary a director may properly rely upon the executive officers for their proper discharge. If custom has charged the directors with any part in the actual conduct of the business, it is the supervision of loans and investments, usually by a committee; and it will be found that substantially all the cases in which directors have been held liable for negligence are for failure in this particular duty.

In view of the provisions of the Act above cited, we submit as matter of law that *a mere director, holding no executive office or committee appointment in the bank, cannot in law be held liable for the consequences of negligence (of which he has no notice) in the performance of executive duties by those officers or employees to whom they belong.* Such, indeed, is the law of the cases; we submit that it is equally the effect of the Act.

As the directors are charged in this case with negligence in failing to examine the bank more frequently, it is material and significant that the Act requires no examinations by the directors, evidently deeming the provisions of sec. 9832 for a semi-annual examination and "a full and detailed report of the condition of the bank" by officially appointed expert examiners an adequate safeguard of all public or private interests.

In this case the examiner testified, and the master found, that the Comptroller assumes to excuse the examiners from verifying the deposit liabilities of the

ank or auditing the depositors' ledger, and to prohibit hem from verifying depositors' accounts, without hich it is obviously impossible to verify the "condiion" of the bank. This was not known to the direcors. (I, 84.)

The Act gives the Comptroller no such dispensing ower. The directors were justified in assuming that he law was being complied with and the true condiion of the bank officially ascertained at each six nonths' interval, and are entitled to have this circumstance given the weight which naturally belongs to in dealing with the question of their negligence. he cases recognize this.

See *Warner* v. *Penoyer*, 91 Fed., at 591.

IV.

The Law as Established by the Cases.

Until the decree of the District Court in this case, r which there is no authority but that of the judge ho made it, it had been the law in England and in is country that bank directors are not liable for egligence in being deceived or defrauded by the seret crime or criminal conduct of an employee of the ank whose integrity they have no special occasion distrust.

The English Cases.

The controlling English cases are the following:

Land Credit Co. v. *Lord Fermoy*, L.R. 5 Ch. App. 763:

Lord Hatherly's much-quoted declaration in this

case that "a director cannot be held liable for being defrauded; to do so would make his position intolerable," was cited and followed by this court in *Briggs* v. *Spaulding, supra.*

Dovey v. *Cory,* [1901] A.C. 477—

where Lord HALSBURY, L.C., delivering the unanimous judgment of the House of Lords, summed up the case by saying (p. 485):

> "I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditor himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to the details of management. If Mr. Cory was deceived by his own officers . . . there appears to be no case against him at all."

Prefontaine v. *Grenier,* [1907] A.C. 101—

a Canadian appeal, in which the Judicial Committee of the Privy Council follows *Dovey* v. *Cory,* holding the rule of that case to be the law of Canada.

The American Cases.

Briggs v. *Spaulding,* 141 U.S. 132, has been for nearly thirty years the leading case in this country on the liability of national bank directors for negligence.

The controlling principles of the case appear in this paragraph at p. 151:

> "A liability of this kind should not lightly be

imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part."

The dissent in that case was not from the principles which it proceeds, but from their application the facts; and, while the case does not in strictness termine the grounds of a director's liability, as no rector was held liable, it has been universally acpted for a generation as setting limitations upon it.

After *Briggs* v. *Spaulding*, the most authoritative se is *Warner* v. *Penoyer*, 91 Fed. 587 (2d C.C.A. 98), a fully considered and unanimous judgment of rcuit Judges WALLACE, LACOMBE, and SHIPMAN, ich covers ground not occupied by *Briggs* v. *Spauld*in holding liable the directors who were members committees appointed to examine loans and disnts, on the sole ground of total failure to perform t duty, whereby the cashier was enabled to wreck bank by fraudulent and worthless loans. Some tements of the law so aptly refute the receiver's ims in the present case as to bear reproduction here, ecially as they are a fair and discriminating umé of the earlier State and Federal cases on the ject and have been accepted for twenty years without dissent or criticism in any later case:

"The directors of a national banking association are authorized to appoint a cashier, and delegate to him all the usual powers of such an office

. . . To him is properly confided the custody of its property, money, securities, and valuable paper, and the supervision of its books and accounts." (p. 590.)

"They are not called upon to devote themselves to the details of the business management, and may properly commit these to clerks and bookkeepers, and to the superintendence of the cashier. They are not required to adopt any system of espionage over their cashier, or any of their subordinate agents, or to entertain suspicion without some apparent reason, and, until some circumstance transpires to awaken a just apprehension of their want of integrity, have a right to assume that they are honest and faithful." (*Id.*)

"They might have required periodical examinations of the books to be made by experts. They might have insisted upon verifying, by personal investigation from time to time, such details of the bank's condition as they ought to have known before declaring dividends, or as were required to be reported to the comptroller of the currency. And, if they had done so, this falsification of entries and accounts would probably have been discovered, if not prevented. But these would have been measures of unusual precaution, not imperative when there was no reason to distrust the integrity or efficiency of the cashier. They are not to be deemed remiss because they did not resort to exceptional methods, or because they relied on the cashier's supervision over the books and accounts, or because they reposed confidence in his reports of the amount and other clerical de-

tails of the assets and liabilities. They were under no duty to observe the extraordinary diligence short of which a bank cannot be protected from the crimes conceived by a dishonest cashier." (591.)

"The case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed, and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is not a correct theory. If it were, the cases would be few in which the directors of a bank, wrecked by the misconduct of a cashier, could not be held accountable for all the losses. *The court cannot decree upon conjecture.*" (593-594.)

n that case the culprit was the cashier himself. reasoning has added force in a case, like this, re the culprit is a subordinate for the oversight whose conduct the cashier is himself directly re-nsible to the bank and the directors.

or a period probably covering the service of every onal bank director now in office in the country, e two cases have been conspicuously the most horitative statement of the law upon this subject. *appellee Barber cannot be held liable consistently either of these cases,* and the argument for him nt stop here.

ther Federal cases dealing with the general lia-y of national bank directors, in accord with *Briggs paulding* and *Warner* v. *Penoyer,* are the follow-

Witters v. *Sowles* (C.C. Vt. 1887), 31 Fed. 1.
Clews v. *Bardon* (C.C. E.D. Wis. 1888), 36 Fed. 617.
Bailey v. *Babcock* (D.C. W.D. Pa. 1915), 241 Fed. 501.
Williams v. *Spensley* (7th C.C.A. 1917), 251 Fed. 58.
First National Bank of Fairbanks v. *Noyes* (9th C.C.A. 1919), 257 Fed. 593.

A leading national bank case in the State courts, also in line with the foregoing, is—

Mason v. *Moore* (1906), 73 Ohio St. 275.

Other leading State cases, though not of national banks, are—

Scott v. *Depeyster*, 1 Edw. Ch. 515.
Savings Bank v. *Caperton*, 87 Ky. 306.

In *Spering's Appeal*, 71 Pa. St. 11, in 1872, a leading case, though not of a national bank, Judge Sharswood reviewed the cases and said for the court that they found none where directors had been held to account except for wilful misconduct or when the loss might have been prevented by *ordinary attention* to their duties. Diligent research has not discovered any such case in the State courts since that time; certainly there is none such in the Federal courts.

The recent case of *Bowerman* v. *Hamner*, 250 U.S. 504, stands on failure of supervision of the *loans and investments*, the proper field of the directors; holding for negligence a director who, though an experienced banker and competent to supervise the business effec-

tively, never attended a meeting nor otherwise attempted to learn the condition or influence the conduct of the bank. It would seem that, without the more or less conjectural finding of fact that "even slight care on his part in the discharge of his duty as a director must have discovered and arrested" the frauds, the judgment could not have been reached. However this may be, Bowerman's position there is so widely distinguished from Barber's here, as an unskilled director, exceptionally diligent in attendance and service to the extent of his ability but without any expert qualifications for the discovery of such a crime as Coleman's, that the case lends no support to the receiver's suit against him.

It hardly need be noted that the following cases in this court, which affirm under various conditions the liability of directors under U.S. Comp. Sts. secs. 9831 or 9685 for knowing or wilful violation of express provisions of the Act, are not precedents for the present case, where no such violation is asserted or claimed:

Yates v. *Jones National Bank*, 206 U.S. 158.
Thomas v. *Taylor*, 224 U.S. 73.
Jones National Bank v. *Yates*, 240 U.S. 541.
Chesbrough v. *Woodworth*, 244 U.S. 73.
Corsicana Nat. Bank v. *Johnson*, Dec. 8, 1919.

In the following cases the directors' liability is affirmed, on demurrer or on the merits, usually for knowing violation of the Act, the cases of negligence at common law being comparatively few.

Robinson v. *Hall* (4th C.C.A. 1894), 63 Fed. 222.

Prescott v. *Haughey* (C.C. Ind. 1895), 65 Fed. 653.

Gibbons v. *Anderson* (C.C. W.D. Mich. 1897), 80 Fed. 345.

Stearns v. *Lawrence* (6th C.C.A. 1897), 83 Fed. 738.

Cockrill v. *Abeles* (8th C.C.A. 1898), 86 Fed. 505.

Cooper v. *Hill* (8th C.C.A. 1899), 94 Fed. 582.

Boyd v. *Schneider* (7th C.C.A. 1904), 131 Fed. 223.

Rankin v. *Cooper* (C.C. W.D. Ark. 1907), 149 Fed. 1010.

Allen v. *Luke* (C.C. Mass. 1908), 163 Fed. 1018.

McKinnon v. *Morse* (C.C. S.D. N.Y. 1910), 177 Fed. 576.

Chesbrough v. *Woodworth* (6th C.C.A. 1912), 195 Fed. 875; S.C. (6th C.C.A. 1915), 221 Fed. 912.

Williams v. *Brady* (D.C. N.J. 1915), 221 Fed. 118; S.C. (D.C. N.J. 1916), 232 Fed. 740.

Freeman v. *Jackson* (D.C. N.D. Ga. 1915), 227 Fed. 688.

Dudley v. *Hawkins* (D.C. S.D. Ga. 1917), 239 Fed. 386.

McCormick v. *King* (9th C.C.A. 1917), 241 Fed. 737.

Curtis v. *Metcalf* (D.C. R.I. 1919), 259 Fed. 961.

The foregoing are believed to embrace all the re-

ported Federal cases in which suit has been held maintainable upon any ground against national bank directors for losses to the bank. They stand only on the ground of (1) conduct amounting to misfeasance, or (2) gross negligence in supervising loans and investments. In no case is there any near resemblance to the present case in the facts, or any attempt to hold directors liable for negligence in failing to discover or unravel the secret crime of an employee of the bank under the cashier's direct supervision and control.

We have not assembled these cases because it is necessary to Barber's defense, but because the collation shows that, as we have said, the receiver is trying in this case to impose upon the directors a kind and degree of liability hitherto unknown to the courts.

V.

SPECIFIC ANSWERS OF THE APPELLEE DAVID A. BARBER TO THE APPELLANT'S ASSIGNMENTS OF ERROR AGAINST HIM (*which appear at length in vol. IV, pp. 1696-1699 of the Record*).

Assignment 1 (IV, 1696) is general and formal—that it was error to dismiss the bill. The general answer to it is in the opinion of the Court of Appeals. (IV, 1647-1672.)

For more specific answers—

(1) The master having found that Barber was not negligent, the Court of Appeals did not err in dismissing the bill as against him, as there is no evidence sufficient to show that the master was wrong or to show any negligence of Barber which contributed to the loss, under the law as laid down in the leading and most authoritative cases. The District Court

wholly ignored the substantive law of the case, neither citing nor applying it.

Briggs v. *Spaulding,* 141 U.S. 132.
Warner v. *Penoyer,* 91 Fed. 587.

(2) Upon the evidence (apart from the case of Edwin Dresser) it is clear beyond question that, so far as negligence of any person contributed to the loss, it was the cashier's lack of proper supervision of the bookkeeper, in omitting to scrutinize his entries and verify his balances in the depositors' ledger and allowing him to handle the checks and slips returned from the clearing-house. (See IV, 1649.) This supervision is strictly an executive duty, for which Barber, as a director, was not responsible and for the proper performance of which he had, in the absence of notice to the contrary, a legal right to rely upon the cashier. It is not claimed, and there is no evidence, that Barber ever had notice of any negligence or incompetence of the cashier.

Authorities *supra.*

(3) As to the omission of the directors to personally examine the deposit ledger or procure an audit of the books during the period of the defalcation: In the final analysis of the situation the only thing that Barber could have done toward more examination or an audit of the books was to move for it in the board; though his more experienced seniors did not move for it, nor the executive officers recommend it, and he knew of no occasion for it, and the national bank examiners never found anything wrong. Under these circumstances, for Barber, a new-comer and least skilled

or experienced member of the board, to take the initiative out of the hands of his seniors and superiors by moving for an examination or audit would have been a forth-putting impertinence; no man of common sense in his situation would have done it. Clearly he was under no such legal obligation to do this that his omission to do it was actionable negligence.

Assignment 2 (IV, 1696) —error in refusing to allow interest on the decree. This does not concern Barber in the present state of the record. If anything more need be said, we rely upon the opinion of the Court of Appeals on this question. (IV, 1673-1675.)

Assignment 3 (IV, 1696) —general error in not holding the directors liable for negligence.

Specification (*a*), for negligence in putting and leaving Coleman in charge of the books.

Barber is expressly excepted from the claim of negligence in putting Coleman in charge, as he was not then a director. As to leaving him in charge: Barber, finding him there, in the absence of notice was charged with no duty, as a director, of inquiring into his fitness to remain. Coleman was under the supervision of the cashier, upon whom Barber had a legal right to rely in the absence of notice of his default, of which there is no claim or evidence.

Briggs v. *Spaulding,* 141 U.S. 132, 146.
Warner v. *Penoyer,* 91 Fed. 587, 590.

Specification (*b*), for negligence in retaining Coleman as bookkeeper without ascertaining that he was making mistakes in his work.

The same answer. It was no part of Barber's legal

duty as a director to inspect or supervise Coleman's work, which, indeed, he was not qualified to do, or to exercise surveillance over the cashier's subordinates.

Authorities *supra.*

Specification (*c*). Barber is expressly excepted from this specification.

Specification (*d*), for negligence in not knowing that Coleman was allowed to handle the checks returned from the clearing-house.

The same answer as to specifications (*a*) and (*b*). Knowledge of these details of the business was no part of Barber's legal duty as a director; they belonged solely to the executive officers of the bank, and Barber had a legal right to rely on them for their proper performance, in the absence of notice to the contrary.

Authorities *supra.*

Specifications (*e*) and (*f*). Barber is excepted from these specifications.

Specification (*g*) (first clause), for negligence in "assuming" that the national bank examiners' examination "was the equivalent of an audit."

There is no evidence in the case that Barber made such assumption, and no evidence that he knew that the examiner's examination was "necessarily rapid" or that "most of the time was spent on loans and collateral," or that he understood the technical difference between an examination and an audit. His undisputed testimony is to the contrary. (III, 1281.)

If the fact were as charged, it is only a single fact bearing on the general question of his negligence, and

is conclusive of nothing. (Barber is excepted from the second clause of this specification.) See also answer to Assignment 7, *infra*, p. 36.

Specification (*h*), for negligence "in permitting numerous meetings to be omitted without adequate excuses."

This is immaterial. There is no evidence in the case having any tendency to show that the omission of any meeting or meetings had anything to do with the loss. And Barber, as a single director, had no power to call meetings. (See By-law 20, III, 1374.)

Nor is there any foundation in the record for this specification. The master found, upon undisputed evidence, that the regular weekly meetings prescribed by the by-laws (III, 1374) were held with few exceptions and most of these accounted for. (I, 65, 66.) The District Court did not disturb or question this finding.

Barber was exceptionally diligent in attendance at meetings. There were 49 meetings in 1907, of which he attended not less than 38 (being abroad two months in this year; I, 65, 192); in 1908 48 meetings, Barber attending 47; in 1909 43 meetings, Barber attending 42; in 1910 down to the closing of the bank, February 21, 10 meetings, Barber attending all. He never missed a meeting when in Cambridge. (III, 1269, 1270.)

Specification (*i*), for negligence in not observing by-law 19 (III, 1373) by ascertaining or verifying every six months, by a committee appointed by the board, the liabilities of the bank as appearing on the depositors' ledger kept by Coleman.

1. At the threshold, this assignment and alleged error is immaterial *unless it is proved as a fact that personal examination of the deposit ledger by a direc-*

tors' committee would have prevented the loss. Of the five judges (including the master) who have examined this question below, only the judge in the District Court has approached such a finding, and his finding was only that, if they had examined the ledger *September 30, 1907*, they would have discovered the fraud; an empty finding as we have noted, since in any view of the case they were under no obligation to examine the bank on that particular day. (The receiver's brief, p. 194, admits this.) The master and all the judges of the Court of Appeals found to the contrary. It cannot judicially be found upon the evidence, in view of the complexity and difficulty of the deposit ledger to any eye but an expert's, of Coleman's proved genius for deception, and the constant changing of his false entries to avoid detection under all the varying dangers of exposure, which he succeeded in doing for three years and until he gave over the attempt and fled. The Court of Appeals was right in its view of this question; its reasoning is a complete and conclusive answer to the receiver's suit so far as it stands upon this ground. (IV, 1655-1657.)

In view of Coleman's skill and celerity in deceit and concealment, and the extent to which his false entries were changed and shifted from time to time, the evidence of which pervades the whole case, it is pure *conjecture* to say that a directors' examination, whensoever made, would have disclosed the fraud. He continuously deceived the national bank examiners, once in their very presence (I, 72, 73; II, 591-2); he deceived the cashier repeatedly (see, for example, III, 1275, 1276); and it is wholly probable that he could

easily have deceived or evaded the directors, and was prepared to do it, as he testified. (I, 72, 73; II, 593-4.)

Any judge who reads Coleman's evidence (II, 766-839) of the complex and artful shifts, changes, and restorations of his false entries involved in the attempt to "fix" his books for the bank examiner on the single occasion of the last official examination in December, 1909, remembering that this process was gone through half a dozen times at semi-annual intervals after the stealing began, in 1906, will see, as the Court of Appeals saw (IV, 1655-1657) that the books cannot be assumed to have been in the same condition September 30, 1907, for example, or on any day during the defalcation, as they were February 21, 1910, when the bank failed, or that the false entries ever remained the same for two consecutive days. It is, therefore, impossible to know what the directors would have found on looking into the books at any particular time, or what arts Coleman would have interposed to deceive them as he deceived the cashier and the bank examiners, and the whole assumption upon which the District Court held the directors liable for $283,000 (I, 298)—that they would have found the same irregularities in the books that the receiver's expert found after the failure—is seen to be baseless.

The receiver's expert accountant testified without dispute that there was no way of detecting from the book alone whether any entry of a deposit or a check was correctly or incorrectly made. (III, 1162.)

Unless examination of the books or papers by the directors *would have disclosed the fraud*, their omission did not occasion or contribute to the loss, and is not actionable negligence. The loss must be shown to

be "the *natural* and *necessary* consequence of omission on their part."

Briggs v. *Spaulding*, 141 U.S., at 151.

This fact, if not inherently incapable of proof, cannot be found upon the evidence under the very peculiar circumstances of this case. The unwarranted assumptions or conjectures, made in the light of after-knowledge, upon which the District Court held that the directors would have discovered the fraud if they had looked into the books, were confuted in the leading case in which the court, under similar conditions, appropriately said: "We cannot decree upon conjecture."

Warner v. *Penoyer*, 91 Fed., at 593, 594.

See also paragraph (3) of answer to Assignment 1, *supra*, p. 24.

2. By-law 19, in any view of it, is immaterial. The directors are to be tried by the standards of diligence established by the law; not by a standard set up in a by-law by their remote predecessors.

3. By-law 19 was made by the directors in office in 1865, more than forty years before these occurrences (III, 1370); it was competent for their successors to expressly repeal it or, therefore, to omit observance of it if they deemed it unnecessary; and this omission, long continued, amounted in effect to abrogation of it within the competency of the directors; see *Briggs* v. *Spaulding*, 141 U.S., at 160, which goes beyond the facts of this case.

4. The District Court treated this by-law 19 as an *mission* by the directors of what they ought to do. , 195.) Nothing but their omission to expressly re- al it can give it any effect as an admission, nor can is, in the face of their non-observance of it, which rectly indicates their own view that they did not ed either to observe or repeal it.

5. By-law 19 does not expressly require and cannot asonably be construed to require the directors *per- nally* to examine and verify the liabilities as shown the depositors' ledger. This would require expert ill and knowledge which national bank directors do t usually possess, are not required by law to pos- ss, and which Barber was found by the master in is case, upon undisputed evidence, not to possess. , 98.) The master and the Court of Appeals found at the depositors' ledger "is a difficult book to fol- w, in which a person not thoroughly familiar with and used to handling it would not be likely to readily tect error." (I, 36, 37; IV, 1655.)

It is settled that knowledge of the contents of the oks and papers is not imputable to the directors. *riggs* v. *Spaulding*, 141 U.S., at 162; *Jones National nk* v. *Yates*, 240 U.S., at 557. This is but a corollary the proposition that the directors are not presumed required to have the skilled knowledge necessary to plore the books and papers effectively, and are not quired to do so.

It was the duty of the cashier, as the official custo- an and supervisor of the books and accounts, to know nat the books showed; the unskilled directors had other means of ascertaining this except by employ- g outside assistance, for which no occasion appeared;

and, having no notice of the cashier's negligence or incompetence, they were justified in relying upon his statement.

Warner v. *Penoyer*, 91 Fed., at 591.

6. If the by-law is material and was in force, it provides only for examination of the bank by *a committee*, appointed by the board. It is conceded that Barber was never appointed on such a committee, and he was under no legal duty to move for one. See paragraph 3 of answer to Assignment 1, *supra*, p. 24.

Specification (*j*), for negligence "in wholly failing to investigate and ascertain the cause of the apparent shrinkage of the bank's deposits."

There is no foundation in the record for the charge of "wholly failing" to investigate. They did investigate, according to their judgment of the situation. The real charge is that they did not *suspect theft*, which the shrinkage did not naturally suggest to them. The master found that the directors were not negligent in this particular. (I, 57, 58.) This finding, as to Barber, is directly supported by uncontradicted evidence. See Barber's Position in Fact, *supra*, p. 11.

The District Court held that the directors should have examined at this time the returned checks and slips then in the bank. This is afterthought, in the light of what is now known. This would not then occur to Barber, unskilled as he was in bank methods, nor could he have done it effectively. An expert could hardly have done it, as the checks were so mixed up in distribution that any clue would have led into a tangled labyrinth, and *there was no clue*, it not then being

known or suspected that any checks were wrong. See Earl's evidence (I, 300, 301, 320, 321) and the master's finding that but for Coleman's disclosures it would have been difficult if not impossible to discover how the thefts were effected. (I, 91, 92.) The directors, as we now know, were wrong in their judgment as to the cause of the apparent shrinkage of deposits, but they are not liable for honest errors of judgment.

Specification (*k*), for negligence in having no audit of the bank from 1903 until the failure.

Barber did not enter the board until January, 1907. (I, 32.) "He came into the directorate of a solvent bank and no reason then existed why he should set on foot an auditing of the bank." Master's finding, undisputed, as to Barber. (I, 98.) See also paragraph 3 of answer to Assignment 1, *supra*, p. 24; and paragraph 6 of answer to Assignment 3, specification (*i*), *supra*, p. 32.

Specification (*l*). Barber is excepted from this.

Specification (*m*), for negligence in making no investigation of Coleman's "habit and methods of life." See answer to Assignment 3, specifications (*a*) and (*b*), *supra*, p. 25.

Barber, as a director, had no legal duty to oversee or examine into Coleman's character or conduct. This was for the executive officers under whom he worked. He found Coleman installed in the bank when he came into the board, and was never put on inquiry concerning him. (III, 1270, 1277.) See Barber's Position in Fact, *supra*, pp. 9, 10, and

Warner v. *Penoyer*, 91 Fed., at 590.

Assignment 4 (IV, 1697) —error in holding that the directors were not required to observe all the provisions of article 19 of their by-laws.

Answered under Assignment 3, specification (*i*), *supra*, pp. 27-32.

This purports to assign error in law. The Court of Appeals, though citing *Briggs* v. *Spaulding*, did not dispose of by-law 19 upon any ruling of law, but examined the whole question as a question of negligence in fact and found the conclusions of the District Court not sustained by the evidence; especially finding it not proved that observance of the by-law as construed by that court would have discovered the fraud, which disposes of the whole question. (IV, 1652-1657.)

Assignment 5 (IV, 1698) —error in holding that the shrinkage of the deposits "did not legally require the directors and President of the Bank to be on their guard and to make a full investigation as to the causes thereof."

Sufficiently answered as to Barber under Assignment 3, specification (*j*), *supra*, p. 32.

This also purports to assign error in law, for which there is no foundation in the record. The Court of Appeals laid down no rule of law as to what was or was not required of the directors by the shrinkage of deposits, but examined the evidence and held that the master's finding upon this issue could not be set aside as clearly wrong. (IV, 1662-1664.)

In this connection it should be observed that *mere shrinkage of the deposits has no necessary or natural tendency to suggest that somebody is stealing from the bank.* It did not suggest *stealing* to the executive

officers, or the trained bank examiners. It naturally suggests a falling-off of custom or patronage. Deposits fall off, presumably, because they do not come in; not because they come in and are *stolen* out.

See also *Warner* v. *Penoyer*, 91 Fed. 587, 590.

Assignment 6 (IV, 1698) —error in finding that Coleman's method of theft was ingenious and novel, etc. (IV, 1648.)

This is immaterial. The Court of Appeals did not exonerate the directors on this ground, nor is there anything in the record to indicate that it was given any greater effect than as a circumstance which might properly be considered in dealing with the question of negligence, as clearly it was. (IV, 1656.)

Warner v. *Penoyer*, 91 Fed. 587, 591.

If it calls for answer: The master found the scheme to be novel upon the agreement of all the counsel, the uncontradicted evidence of the national bank examiner and the receiver's expert accountant, and Coleman's evidence that he devised it for himself (I, 41, 96; II, 839; III, 1158); and there is no evidence in the case that such a scheme was ever before practised or heard of.

The ingenuity of the scheme, though not brought out nor intended to be in the appellant's assignment, is apparent on the face of the master's description of it, upon undisputed evidence, and the fact that the skilled and experienced bank examiners, to say nothing of the executive officers of the bank, never detected nor even suspected it in three years. (I, 40, 41.)

Assignment 7 (IV, 1698) —error in "apparently holding" that the failure of the national bank examiners to find anything wrong with the bank tends to exonerate the directors.

The Court of Appeals did not "hold" this proposition as law nor exonerate the directors on this ground, nor is there anything in the record to indicate that it was given any greater effect than as a circumstance which might properly be considered in dealing with the question of negligence as a question of fact, as clearly it was. (IV, 1656.)

See *Warner* v. *Penoyer,* 91 Fed., at 591.

We submit, as matter of law, that in view of the provision for official examination of national banks (U.S. Comp. Sts. sec. 9832) *it is a necessary effect of the Act* that directors may fairly place some reliance upon the examiner's report, and that this may be considered in passing upon a charge of negligence in the directors in not making more frequent audits or examinations.

The examiners' favorable reports could not but have a legitimate tendency to inspire confidence in the condition of the bank. It is speaking within bounds to say that the examiners are largely responsible for the wrecking of this bank *unless Coleman's scheme was so adroitly managed that even they are excusable for not detecting it,* and, if so, it is idle to charge unskilled directors with actionable negligence in not detecting it.

Assignment 8 (IV, 1698) —error in holding "in effect" that the directors were not guilty of negligence

in failing to make or cause to be made full examination of the bank's condition from time to time after September 30, 1907.

Answered as to Barber under Assignment 1, par. 3, *supra*, p. 24, and Assignment 3, specifications (*i*) and (*k*), *supra*, pp. 27-30, 33.

Apparently this assignment intends to charge error in law. The Court of Appeals made no such ruling of law, but found as fact upon the whole evidence that negligence in this particular, contributing to the loss, was not so clearly shown that the master's finding to the contrary must be reversed as clearly wrong. (IV, 1652-1657.)

Assignment 9 (IV, 1699) —error in allowing costs to the defendants as to whom the bill was dismissed.

Costs were properly allowed, under Rule 31, paragraph 3, of the Circuit Court of Appeals. The receiver's bill is essentially an action to recover damages for negligence, with nothing equitable about it but its form, in which costs should be awarded to the prevailing party as of right, as in actions at law. If not, the allowance is at least discretionary, as in equity proceedings generally. In either aspect, and in view of the rule, the allowance is not error.

VI.

Summary of the Argument.

The Court of Appeals did not err in ordering the bill dismissed as against the appellee Barber if there is any conclusive reason why the receiver's suit cannot be maintained against him. There are such reasons, both of law and of fact.

The General Reason.

Premising the undisputed rule that each director is to be tried upon the facts of his own case, and the undisputed facts that Barber, while exceptionally diligent in attendance and service to the extent of his layman's capacity, had no skilled knowledge of banking or bank accounting: He can be held liable, and the District Court was able to hold him liable, *only by charging him with the executive duty, and with expert knowledge sufficient to qualify him for the duty, of supervising the conduct of the bookkeeper and examining and verifying the bank books and papers; which duty does not in law belong to a director and which knowledge a director is not held in law to possess and Barber did not possess.*

Special Reasons of Law.

1. It is settled law that bank directors are not liable for negligence in being deceived by the criminal conduct of an employee whose integrity they have no special occasion to distrust. If there are any exceptions to this rule, Barber is not within them.

2. Barber, as a director, holding no executive position and never appointed upon any committee of the board, cannot in law be held to the duty of examination of the bank's books or papers or surveillance over the work of employees.

3. It is plain that the negligence (if it was legal negligence) which made the loss possible was the cashier's failure to keep watch of Coleman's books and the clearing-house checks and slips. Barber, as a director, having no notice to the contrary, had a legal right to rely upon the executive officers for the proper

erformance of these strictly executive duties, and nnot in law be held liable for the consequences of eir non-performance.

4. Finally: There can be no case in law against arber without proof and finding that the cashier was gligent (which the evidence may warrant, though it s not been directly found below and the master und that he was justified in trusting Coleman), and at *Barber had notice of his negligence,* of which ere is no evidence and no claim.

Special Reasons of Fact.

1. *It was not negligence* in fact that Barber did t do what he was not qualified to do, or attempt to what he knew he was not qualified to do, in examing the deposit ledgers, or the checks and slips, or herwise.

2. As an unskilled and inexperienced director, at e foot of the board, *it was not negligence* in fact at he did not assume to originate measures of preution, of the character or necessity of which he as not qualified to judge, knowing that the executive ficers and his seniors in the board, whose integrity d capacity he had no occasion to distrust, were better alified than himself to judge of all such matters. other words, *it was not negligence in fact that he d not assume to know better than they did how to n the bank or what action the welfare of the bank om time to time required.*

3. He cannot be held liable unless it is *proved* as a ct that, if *he* had done something which he omitted do, *his action* would have prevented the loss; as, if t, the omission did not contribute to the loss and is

not actionable negligence. In view of Coleman's proved capacity for deceit and evasion, the constant shifts and changes in his false entries, and the complexity of the deposit ledger at its best, *it cannot judicially be found upon the evidence* in this case that any examination of the books that *Barber* could have made would have discovered the fraud. It rests wholly in *chance* and *conjecture,* with all the chances against it. Much less can the master and the Court of Appeals be found or held clearly wrong in their findings to the contrary.

4. As to Barber, the same is true of any attempt *he* might have made to find out the cause of the apparent shrinkage of the deposits. It is easy *now* to see that *skilled* examination of the checks and slips *might*—it cannot even now be found that it *would*—have led to discovery. But there was nothing in the situation then to suggest this, or to suggest *stealing,* to *him,* nor could *he* have done it if suggested; and no such judicial conclusion can be drawn from the evidence.

5. It is familiar law that the manner and appearance of witnesses under examination is a part, and may be a highly material part, of the evidence. In this case the alleged negligence of the directors was in being deceived and defrauded by an employee of the bank with whom they had no direct relations, Coleman being under the direct supervision of the cashier, who was himself deceived by Coleman, and in his turn, though unwittingly, deceived and misled the directors. The master had the advantage of personal examination and observation of all parties involved in the scheme of deception, the cashier, the bank examiners, and all the directors (except Richardson, de-

ceased) testifying orally before him, Coleman for sixteen days. Thus he alone had before him *all the evidence* and materials of judgment upon the important issue whether Earl or the directors were *negligent in being deceived* by Coleman, and the vital question whether they *would have discovered* the fraud by further examination *so long as Coleman was there and on guard against discovery;* an advantage of which all the judges reviewing the case are deprived. The burden of proof is upon the receiver; he has no case unless it is *proved* that further examination by the directors *would have disclosed* the fraud; and, if the whole evidence upon these issues, of which personal observation of the witnesses is a highly important part, was *in equilibrio* before the master, no actionable negligence was proved, and it is correspondingly difficult—*it is in fact impossible*—to say that his findings were clearly wrong. It is a case for application of the rule stated by Mr. Justice HOLMES in *Adamson* v. *Gilliland,* 242 U.S. 350, 353.

We regret that we must earnestly remonstrate against the manner in which the receiver, in fifty pages (115-165) of his brief, has dealt with the report of the master; an ex-judge of high character, whom the receiver joined in selecting for the hearing of his case, in all of whose principal conclusions, except as to the liability of Edwin Dresser, the Court of Appeals unanimously concurred, as Judge BROWN did in that. Many of the strictures upon him are trivial and immaterial; many are open at a glance to explanation; the charges of misconduct may be left without comment to the judgment of the court.

In the desire to abridge this brief we have refrained from extended argument, as not essential to Barber's case, of some questions which may be more fully dealt with by counsel in Nos. 155, 156, and 158, to be argued herewith, the benefit of which we respectfully invoke if needed.

There was no error in the decree of the Court of Appeals ordering the bill dismissed as against the appellee David A. Barber, and it should be affirmed.

ALBERT E. PILLSBURY,
ARTHUR P. FRENCH,
Of Counsel.

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Supreme Court of the United States.

October Term, 1919.

No. 158.

JOHN L. BATES, RECEIVER OF THE NATIONAL CITY BANK OF CAMBRIDGE, MASS.,
APPELLANT,

v.

CLARENCE ALFRED BUNKER AND JOHN D. HARDY, ADMINISTRATORS, ETC., OF GEORGE E. RICHARDSON, DECEASED,
APPELLEES.

Brief of Clarence Alfred Bunker and John D. Hardy, Administrators.

CLARENCE ALFRED BUNKER,
In Behalf of Self and Co-Administrator.

ALDEN G. GEORGE & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

October Term, 1919.

No. 158.

JOHN L. BATES, Receiver of the National City Bank of Cambridge, Massachusetts, *Appellant*,

v.

CLARENCE ALFRED BUNKER and JOHN D. HARDY, Administrators, etc., of George E. Richardson, deceased, *Appellees*.

Brief for Clarence Alfred Bunker and John D. Hardy, Administrators.

HISTORY OF CASE.

The appellant as receiver of the National City Bank of Cambridge, Massachusetts, brought a bill in equity against the president and four of the six other directors of the bank to recover from them approximately $300,000 (the amount stolen from said bank by George W. Coleman, its bookkeeper), alleging that the failure to discover and stop the stealings was due to the negligence of the several defendants in their management of the bank.

There is no claim that any of the defendants were in any way cognizant of the stealings, which were not dis-

covered until the day the bank closed, or that any of them benefited in any way from them. (On the contrary, they were all heavy losers, both as stockholders subjected to a 100% assessment, and—except Richardson—as, directly or indirectly, large depositors.)

The bill contains also allegations of certain special matters brought to the attention of the defendants other than Richardson, and especially Edwin Dresser, which, it is claimed, should have put them upon their inquiry. These are the basis of the majority decision of the Circuit Court of Appeals against Edwin Dresser, but do not affect in any way the case against Richardson.

The case was referred to Hon. Robert O. Harris, formerly judge of the Superior Court of Massachusetts, as special master, and after thirty-one days of hearings he filed a master's report in which he found that the defendants were not negligent, and consequently were not liable in this action.

Exceptions to the master's report were argued in the District Court before BINGHAM, J., who in effect wrote a new master's report (I, 175-211), which he said (I, 208)—

> "embodies my findings of fact and rulings of law in this case. So far as the findings and rulings of the master are consistent with or are embodied in my findings, they are affirmed; but so far as they are repugnant to or inconsistent with them, I find that they are clearly against the weight of the evidence or so inconsistent with other facts found by him and herein affirmed that they cannot stand."

In accordance with this opinion a decree was entered against all the defendants, jointly and severally, in the sum of $283,218.20, and costs (I, 172).

The defendants severally appealed from this decree, and the appeals were argued before the Circuit Court of Appeals composed of Judges DODGE, ALDRICH, and BROWN. They unanimously found that the District Court was in error in holding the defendants liable upon the ground set forth in the opinion and ordered a decree dismissing the bill as to all the defendants except one, namely, Sumner Dresser, administrator of the estate of Edwin Dresser, but as against him a majority of the Court held that, because of the "special warnings," Edwin Dresser, the president of the bank, was chargeable with negligence, and ordered a decree against him for about $265,000. From the decree against Sumner Dresser, Administrator, he appealed, and thereafter the receiver appealed from each of the three decrees based upon this decision, and these appeals are now before this court as cases Nos. 155, 156, 157, and 158.

This case, No. 158, is the receiver's appeal from the decree dismissing the bill as against George E. Richardson, originally named as defendant, who died before the master's report was filed, and whose administrators, Bunker and Hardy, were later joined as parties defendant.

SCOPE OF BRIEF.

In this brief it will be assumed (though it is not conceded) that the decision of the Circuit Court of Appeals was right in holding the estate of Edwin

Dresser liable for the reasons set forth in the opinion (reasons which have no bearing upon the alleged liability of Richardson); and this brief will be confined to the consideration of those portions only of the entire case which affect Richardson's liability, and to showing that, whatever may be decided as to the other directors, the Circuit Court of Appeals was right also in ordering the bill dismissed as to Richardson.

STATEMENT OF FACTS.

The facts of the case are so fully stated in the master's report and in the various opinions that it is unnecessary to recite them here at length. Suffice it to say, Coleman, the bookkeeper of the bank, a young man of twenty-three when the bank closed in February, 1910, by an ingenious and novel method succeeded in the course of about three years in robbing the bank of some $300,000 without arousing the suspicion of any one connected with the bank that there was any stealing going on. He concealed his stealing by falsifying his book, the depositors' ledger, in several different ways, but always "fixed" it so that the national bank examiners on their semi-annual visits never found anything to arouse their suspicion. The effect of his method of concealment was to reduce the apparent liabilities of the bank by making the amount due depositors appear on the books less than it really was. The defendants were the president and four of the other directors of the bank at the time of its suspension.

BASIS OF ALLEGED LIABILITY.

The claim of the plaintiff is based on the alleged negligence of the several defendants in not discovering and stopping the thefts. That each is liable only for his own negligence, not for the negligence of the others, and only so far as his own negligence, if any, was the efficient cause of the loss is so elementary as not to require any citation of authorities.

In a case like the present there is great danger that the joining of all the directors in one action will result in injustice, because the facts against each are not separated, and there is therefore a strong, although perhaps unconscious, inclination to hold every one responsible for all the acts or omissions shown.

The Circuit Court of Appeals has rightly recognized the severalty of the liability by differentiating the president and the facts relating to him, which was as far as differentiation was necessary in view of its decision. It is hoped that this court will have no occasion to go further, but it seems desirable to call its attention to the fact that Richardson's position is different from that of any other of the directors, and to make sure that he shall be charged only with the evidence against him, and not be made to suffer for the defaults of others, as he so clearly was by the decision of the District Court.

RICHARDSON'S POSITION.

Richardson was elected a director at the annual stockholders' meeting in January, 1907, and thus was the junior director in point of service (Barber having been elected by the directors December 31, 1906, to

fill a vacancy caused by the resignation of one Hazen). He was known to be a teller in the New England Trust Company of Boston, whose duties would not permit his being away during banking hours to attend the directors' meetings in Cambridge at 9.30 on Monday mornings. In addition, his health was so poor that he had to be away from his business in Boston forty or fifty business days out of the year in addition to his vacation of one month (III, 1291). Consequently, as was expected when he was elected, he was not able to attend the directors' meetings with regularity.

To add to his misfortunes, on April 18, 1909, he fell and broke his knee-cap, so that he was confined to his bed, then had to go to a Boston hospital for an operation, and did not get back to doing his work until December of that year (III, 1287). Of course, during this period, which happens to be the period of Coleman's greatest activity in stealing, he was physically unable to attend any directors' meetings.

These causes combined to prevent his taking part in the acts of the directors, and it must be borne in mind when reading opinions and briefs that, in almost every instance where it is stated that "the directors" did or knew something, accuracy would require "the directors *except Richardson,*" and care must be taken not to charge things against him which are not meant to be or should not be so charged.

The plaintiff in his brief has stated that the evidence of some facts in Richardson's favor was "vague," not recognizing the fact that the evidence *against* Richardson was still more vague, and apparently relying upon the false theory mentioned by

WALLACE, J., in *Warner* v. *Penoyer* (91 Fed. Rep. 587):

> ". . . the case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed, and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is not a correct theory. If it were, the cases would be few in which the directors of a bank, wrecked by the misconduct of a cashier, could not be held accountable for all the losses. The Court cannot decree upon conjecture."

EVIDENCE AGAINST RICHARDSON.

The plaintiff has produced absolutely no positive evidence against Richarson, other than the fact that he was a director, and, if the case against him is considered, as it must be, solely on the basis of the testimony against him, regardless of the testimony against the other defendants, there is nothing in the case to justify holding him liable.

None of the "special warnings" which are alleged to have been received by one or more of the other directors are even suggested to have been known to him.

The only thing which it is even hinted that he knew, which should have put him on his guard, is the shrinkage of deposits, and, although it is shown that this matter was discussed at directors' meetings in the fall of 1909, this was during his incapacity on ac-

count of a broken knee-cap, and he was not present at those meetings, so that there is not a shred of evidence that he knew of the shrinkage or received any warning from that source.

The other directors testified that they knew of by-law 19, but there is no evidence that Richardson ever had it brought to his attention in any way. Consequently the statement of the district judge, as a foundation for his finding, that this by-law is "in the nature of an admission on the part of the directors as to what they regarded they were called upon to do" and "that they knew what it called for as they understood they were to make examinations twice a year," is entirely unsupported by any evidence whatever so far as Richardson is concerned.

It is submitted, therefore, that on the plaintiff's own case there is no evidence upon which Richardson can be held.

EVIDENCE IN RICHARDSON'S FAVOR.

Richardson unfortunately died before the plaintiff had finished presenting his case to the master, so that he never had the opportunity of testifying in his own defense, and the testimony on his behalf comes from his two friends Hardy (III, 1219-1223) and Goddard (III, 1352-1358) and his family physician, Dr. E. E. Bancroft (III, 1286-1291).

From their testimony, supplemented by the bank records, it appears that Richardson consented to be elected to the board of directors in January, 1907, at the urgent request of Edwin Dresser in order to make up the minimum number of five required by the Na-

tional Bank Act. He objected strenuously, both because his health was not good and because his employment as teller in a Boston bank would not permit of his attending directors' meetings; but Mr. Dresser assured him that he would not be called upon to attend meetings and that Mr. Dresser and the other directors would endeavor to find another desirable man for the position in whose favor he could retire. Mr. Richardson finally consented, and in spite of the obstacles attended four directors' meetings in his first year. Under the same circumstances and with the same agreement he was re-elected in 1908, all the stockholders present at the meeting knowing of the conditions. In that year he was able to attend only one meeting, but before the next annual meeting he succeeded in persuading Josiah H. Goddard, president of the South End National Bank of Boston, to agree to take his place, only to find at the last minute that this arrangement, which he understood to be satisfactory to Mr. Dresser and Mr. Gale, did *not* meet with their approval, and that they would not consent to Mr. Goddard's election. Shortly after his election in 1909 he fell from a step-ladder and broke his knee-cap, so that he was confined to the house for five or six months and was not able to take up his duties regularly at the New England Trust Company until December. Consequently, of course, he was unable to attend any directors' meetings after the accident, although he had succeeded in attending two in 1909 before that time. By the time the annual meeting of 1910 came around Mr. Dresser had changed his mind and had consented to the election of Mr. Goddard and his friend Mr. Charles G. Ban-

croft, a man familiar with banks and at that time receiver of the Jewellers Bank, and, when he testified, president of the Lincoln Trust Company of Boston. Mr. Richardson sent express word that he should not be re-elected at this meeting. Despite this request the stockholders, all but one of whom at any rate knew the circumstances, re-elected him, and in order not to embarrass his friends, who had gone onto the board at his request, in their pending negotiations for the sale of the bank he qualified to serve temporarily, and so was a director when the bank suspended, the next month. Throughout the whole period of his directorship and for some time before his health was very poor, so that he was obliged to be away from his position as teller forty or fifty business days in the year in addition to his vacation of a month. In fact his health was so poor and he was out so much that his friends were surprised that he was able to retain his position with the trust company. Although Richardson did not attend directors' meetings regularly, he did keep in touch with the affairs of the bank by conversations with Dresser and Gale in Boston and by telephoning to the bank from time to time, and on all these occasions he was assured that the business of the bank was in good condition.

The plaintiff in his brief (81) ridicules the statement (which he is the only one to make) that Dresser, Sr., sought out Richardson in Boston to consult with him. No such contention is made on Richardson's behalf; it certainly is unlikely that a "masterful man," who practically ran the bank, should have sought out a mere teller for advice. The testimony, which is short but explicit (III, 1222), is that

Richardson "saw Mr. Dresser and Mr. Gale in the New England Trust Co. occasionally, and talked with them about the Bank."

The only possible reason for holding Richardson, upon the evidence, is simply because he did not by intuition know of Coleman's stealing, and then instruct Dresser, his elder by many years of experience, and the other members of the board, all his seniors in office, that his intuition was right and should be followed.

Not until there are added to the facts applicable to his case the alleged shortcomings of the elder Dresser in disregarding the so-called warnings, the now-discovered blindness of Earl, and the failure of the directors at the bank to see what the plaintiff claims they should have seen, does there appear color enough to the claim to rouse the feeling that some one was to blame, and the desire to hold every one in sight.

If there was actionable negligence in the case, it was on the part of the persons who were entrusted with and undertook the active management of the bank, and those who received whatever warnings there were, and not on the part of Richardson. He should not be made to suffer for their shortcomings.

It is confidently submitted, therefore, that, even if this court should find itself compelled to reverse the Circuit Court of Appeals and hold all the other directors liable to a greater or less extent, it would nevertheless be equally compelled to find that a careful consideration of the evidence against Richardson revealed no sufficient evidence upon which to hold *him*.

MASTER'S FINDING IN FAVOR OF DIRECTORS CONFIRMED BY CIRCUIT COURT OF APPEALS.

Neither the master nor the judges of the Circuit Court of Appeals found it necessary to differentiate between the different directors, other than the president, and all four of them agreed that the claim of negligence on the part of these directors was not sustained. The district judge alone was able to work out a theory upon which to hold them and to find evidence which to his mind supported it. He was clearly wrong, as will be shown hereinafter.

WEIGHT TO BE GIVEN MASTER'S REPORT.

Whether the findings by the master on the question of negligence, which is largely a question of fact, are to be treated as legally conclusive will, as heretofore, be left for argument by counsel for the other defendants, and will not be considered in this brief.

However that may be decided, it is confidently urged that this case is one where the finding of the master on the question of negligence is especially entitled to be confirmed, for there is no question but that there is ample evidence to support it.

The question for decision is whether these defendants were guilty of negligence; and they must be judged, not by the facts now marshaled and presented by the plaintiff, but by the facts and circumstances as they appeared, and reasonably appeared, to the defendants themselves at the time they were called upon to act.

There is a mass of detail in the testimony of Coleman, Fraser, and Currier the importance or unimpor-

tance of which can be appreciated only when it is carefully studied and compared. To any one having merely the printed record, without the advantage of actually seeing the books and the entries, this testimony can be nothing but a maze, in which to get lost. No one but the master had the opportunity to hear the testimony regarding these details, with the exhibits before him, considering them one by one, until they were clear to him, many of them in connection with the testimony of different witnesses. No one but he could appreciate, as the expert testified day after day and month after month (from July 8 to December 31), the time and labor required to discover and expose the false entries which it is claimed the defendants should have discovered.

No human being, never mind how able or learned a judge he be, with only the printed record, can ever understand this testimony and its interrelation as the master could and did.

But more important still is the evidence which the master *saw*. He had before him as a witness for sixteen days Coleman, the cause of all the trouble, with his books before him, working out one by one his false entries. He had ample opportunity to study him, and see him at work somewhat as he appeared to the directors. He saw and heard Earl, the cashier, upon whom the defendants relied to handle the bank, and Currier and Pepper, the two national bank examiners. He also had before him, on the stand and off, all the defendants (except Richardson), and the two other directors, Goddard and Bancroft.

It was almost as if he were put right into the banking room with the business going on, saw with his

own eyes what the defendants saw or could have seen, and heard and talked with all the persons concerned. He saw and felt that indescribable element, the personality of each of the parties.

He has taken a view, so to speak, and not a mere cursory view, but has lived with that view for days and days, until he has become familiar with the whole surrounding landscape and knows its very atmosphere. He has thus seen and felt evidence, material and very important, which can never be reproduced upon the printed page, and which, therefore, has never been and can never be presented to the judges who hear the case. He alone, therefore, has been in a position to see and feel the circumstances under which the defendants were called upon to act, and so can better determine whether under those circumstances they acted as reasonably prudent men would have acted.

It is manifest, therefore, that he is the only judge who has had or can have *all* the evidence before him, and that for that reason his findings, which are amply supported by testimony, should be confirmed.

Plaintiff's Criticism of Master Unfounded.

In this connection justice to the master compels a few words with reference to the attack upon him and his report which take up some fifty pages of the plaintiff's brief (115-165).

So far as the attack is upon the good faith of the master (e.g., 117, 120, 138, and 143), it is unjustifiable and unfounded, and rests only upon the imagination of disappointed counsel and his warped interpretation of some parts of the report. It would be

surprising if, in a case involving thirty-five days of testimony covering over two thousand pages of stenographic record and a packing case full of books of accounts with hundreds of thousands of entries upon them, a master should succeed in condensing his report into seventy-five pages without making some omissions and apparent inconsistencies. And it is rather in favor of the report that, with all his fine-tooth combing, the plaintiff's attorney has been able to find so few *real* errors, and not one of them really material to the decision, committed by the master, very likely with the aid (?) of his stenographer.

Perhaps comment upon a few of them is worth while to show how unimportant they really are:

(1) Inconsistent statements regarding Coleman and many others of the statements complained of are instantly cleared up when read in connection with their context, and it is noted with what period or aspect of the case the master is for the moment concerned. "About eighteen months" and a similar use of round numbers in other places is not material in connection with the context and is entirely innocuous so long as accurate findings were made where material, as is also the use of the round figures $35,000 to $50,000 in connection with Edwin Dresser's personal deposit, the evidence (I, 381, *seq.*) showing a maximum (until almost the close of the bank) of $52,761.

(2) Earl's incompetency: The excluded evidence referred to was offered on the first day of the hearings and was clearly incompetent. It applied only to his failure to report rumors or facts derogatory to Coleman, was similar to the Lombard evidence, which

was admitted, and had no bearing upon the general competency of Earl, to which the master's finding relates.

(3) Exhibit 13: The charge of bad faith is, as before stated, unfounded. The further criticism involves interpretation to be put upon "similar situation," which plaintiff interprets as applying to both the preceding sentences, whereas the master undoubtedly had in mind only the first of these two sentences.

(4) The use of words other than those which plaintiff's attorney would have used, *e.g.*, "insolvent," "somewhat critically," "accounts," etc., seems hardly basis for serious criticism.

(5) The complaint that the master "proceeds to figure" the percentage of errors in a manner unfavorable to the plaintiff, insinuating intentional unfairness, seems hardly justified when it appears that the master is quoting the figures made by the plaintiff's own expert witness, Fraser (III, 1143)—and the plaintiff himself admits (Brief, 156) that fully half of these were honest mistakes, easily explicable, the discovery of which would have had absolutely no tendency to reveal Coleman's stealings.

(6) The errors in the master's tables of deposits and checks are immaterial and may well have occurred in copying; which is also probably true of the mistake in the table of shortages (emphasized by the correction to the wrong figure by sticker after the record was printed) (I, 81). If these are so reprehensible as to discredit the whole report, what is to be said of the discrepancies between the figures in the tables of shortages in plaintiff's brief (34) and the testimony of the plaintiff's expert, Fraser (II, 1015,

1019, 1021, 1023, 1027, and 1033), giving different figures, and in one case *two* different figures, for some of them.

Others of the criticisms are as easily explicable, but they are too unimportant to justify further attention.

WEIGHT TO BE GIVEN THE DECISION OF THE DISTRICT JUDGE.

The district judge reversed the master completely, drawing entirely different conclusions from the evidence.

In view of the fact that, as just pointed out, he did not have the benefit of the important visual evidence which the master had, his decision ought, if it is to have weight, to show that the evidence which he did have was carefully considered and understood.

Unfortunately, however, there is undeniable internal evidence in the opinion that some of the evidence either was never read or was not understood. And this on matters which were important in their bearing on his final decision.

For instances, he states (I, 191) that Edwin Dresser's balance on December 2, 1909, was $39,068.31, and that "There was no erasure and raising of the balance due Edwin Dresser in this column although it is apparent that there had been in that of the preceding Tuesday. The examiner not only did not add the column, but failed even to glance over it, for, had he done so, he would have seen that the footing was several thousand dollars less than the one item in the column to the account of Mr. Dresser." This statement disregards entirely the evidence of Coleman (I, 397) that some time after the

examination he altered this very balance by changing a "1" to a "3"; which was repeated (II, 809-811) and was corroborated by counsel and the master after examination of the entry, and disregards also the explicit testimony of Pepper, the examiner (III, 1234), that he remembered that particular item and that when he saw it it was $19,068.31, and his further testimony (III, 1234-1235) that he did add that and the other columns.

Again, the judge has just previously stated that at the time of Pepper's previous examination he did not add the balance columns, again disregarding the explicit and undisputed testimony of the examiner to the contrary.

And yet again, he states, speaking of Currier's examination in June, 1909: "it would seem that at the time of this examination the bank examiner could not have added the balance columns at all, for, if he had, he would not have found them correct." But Currier testified (III, 1195 and 1207) that he did make the addition, and produced in corroboration his sheets with the footings upon them, explaining incidentally an apparent discrepancy of $100. His testimony was further corroborated by his own check mark upon the book itself.

And still again, he states (I, 182) that the "Depositors' pass books were balanced by Coleman and the messenger." He evidently had overlooked Earl's testimony (I, 326-328, 340) and Coleman's testimony (II, 642-643), which showed that the teller and the cashier also had a part in that work.

So, also, in speaking of the "Wright audit" of 1903 (I, 208), he states "that it took from twelve to fourteen days for two men to make it," disregarding

Wright's own testimony (II, 846) that it took "three and a half days of my own time and four days of Mr. Andrews'."

Throughout the decision the judge makes the fundamental but erroneous assumption that the figures that he found on the books were the figures which would have been found there on the date under which they appeared. This is contrary to the repeated testimony of both Coleman and Fraser, which showed many alterations and erasures, some made at indeterminable times and others admittedly on dates subsequent to those under which they appear.

Such absolute and complete disregard of explicit and uncontradicted testimony not only discredits the particular finding, but casts doubt upon the whole decision.

DISCUSSION OF DECISION.

The decision itself is in the following words (I, 208):

> "I find that the defendants were negligent in not making examinations of the bank twice a year and not ascertaining, when such examinations were made, whether the liabilities of the bank, as they appeared on the depositors' ledger, corresponded with the balance due depositors on the cashier's ledger, and that had they made such an examination September 30, 1907, and only added the balance footings for the purpose of making a comparison they would have ascertained Coleman's irregularities, and not having done so they are responsible for his defalcations after that date."

The sequence of discussion in the judge's opinion seems to indicate the manner of reaching the final decision. This decision comes on the 34th page of the opinion after a long discussion of Coleman's stealings and false entries, of the alleged warnings to Edwin Dresser and others, and of all the information accumulated by the attorneys for the plaintiff and their expert in months of investigation and study of the books, most of which was entirely unknown to the defendants and none of which was ever presented to them in such form as that in which it was presented to the master. And then—breaking off right in the midst of this discussion—"but however this may be, it seems to me, and I find," apparently, though of course not expressly, that, judging from the results, the directors *must* have been negligent, and that therefore they should be held liable in this action.

There seems to be no attempt to see the facts as the defendants saw them—upon which alone their negligence or freedom from negligence can be determined—no attempt to get into the place of the director to see what he saw in its relation to the actual practical workings of the bank; but only the setting up of an exact, arbitrary standard of care by one evidently unfamiliar with the details of banking, based upon facts unknown at the time the standard was to be acted upon.

On the one hand is a standard of care formulated, years after the event, from facts then unknown and undreamed of, upon a mere reading of some of the evidence in this case by one without experience in the banking business.

On the other hand is the standard of care set up and acted upon for years by these directors, who, however poor they may have been, had experience and knowledge of the business and requirements of this particular bank (which the judge never had)—a standard not questioned by the Comptroller's department, expressly charged with the duty of keeping banks up to proper standards, nor by the representatives of that department who went into the bank and examined it year after year—a standard not disapproved by the master in this case, who saw the witnesses, heard the testimony as it gradually developed the situation in which these directors were placed, and tried to see it as they must have seen it with the information which they had.

By-Law 19.

In the discussion (I, 195) of by-law 19 (which may be found on page 1373 of the record) the judge really states the basis upon which he later finds the defendants liable, for it is evident from a reading of the opinion that his decision hinges on that.

A careful examination of this discussion shows that the theory set forth cannot serve as a basis for a finding against Richardson. The judge says that "the only effect that should be given to the by-law is to treat it as a piece of evidence in the nature of an admission on the part of the directors as to what they regarded they were called upon to do in performance of their duties in examining the bank." This cannot apply to Richardson, for, as he did not testify, he could have made no express admission, and as there is no evidence that he knew of this by-law—passed on

the organization of the bank, more than forty years before he became a director—there can be no implied admission.

The judge, perhaps feeling the weakness of this suggestion, then goes on to qualify it: "If the directors were not chargeable with knowledge of what the by-law called for, it seems to me that the fair inference is that they knew what it called for, inasmuch as they understood they were to make examinations twice a year." But this cannot apply to Richardson either, for there is not a scintilla of evidence that he had any such understanding, nor anything to justify such an inference. Surely a man is not to be mulcted of $283,000 because of an inference based on nothing more substantial than this!

But it may be urged that, aside from any obligation under the by-law, there is an absolute obligation upon each director personally to make a semi-annual examination of the bank, and in such examination to verify personally the total amount due depositors from the depositors' ledger.

No evidence of such a requirement for semi-annual examinations has been called to the attention of the court in this case, and it is therefore safe to say that it does not exist. Evidently the Circuit Court of Appeals knew nothing of it (IV, 1653, 2d par.).

And it is equally certain that there is no requirement that in any examination made by them they shall look at or verify any particular figures on any particular book. Much less that they shall do the particular act with reference to the particular amounts prescribed by the judge, viz., add together the totals of the balance columns of the depositors'

edger. Why stop with the addition of the footings of the balance columns? There is no logical reason why the examiner should not be held to go a step further and verify the footings, or still another step and verify the individual extensions of balances, or even another step and check up the original checks and deposit tickets so far as they are accessible. Until he gets them he will be depending upon the accuracy and trustworthiness of an employee of the bank in making entries upon the books. It is merely a question of where to stop. If fraud or dishonesty is found or suspected, there is absolutely no stopping place until every entry has been checked up—a task that in this case kept the plaintiff's expert Fraser busy for months. But in the absence of suspicion it is submitted that reasonable diligence is shown when the total of deposits shown on the cashier's ledger, stated by him to be right and to agree with the totals of the depositors' ledger, is accepted by the directors in making their examination, and that the directors are not bound at their peril to see this for themselves. If that is not sufficient, again how far must they go? If they can't trust their cashier, can they trust one another, or must each director verify for himself? Why?

Incidentally it might be remarked that there is no possible way of absolutely checking up the liabilities of a bank; there may be deposit accounts fraudulently omitted from the ledger (*e.g.*, I, 448-450); there may be outstanding certificates of deposit or cashier's checks or other obligations not entered upon the books and in no way ascertainable.

Decision Rests on Highly Improbable Conjecture.

But there is another and, it is submitted, a conclusive reason why the decision cannot stand.

It rests upon the finding (I, 208)—

> "that had they made such an examination September 30, 1907, and only added the balance footings for the purpose of making a comparison they would have ascertained Coleman's irregularities, and not having done so they are responsible for his defalcations after that date."

This finding involved the existence of two legal obligations upon the defendants, including Richardson:

(1) an obligation to make an examination upon a day certain, and that day September 30, 1907; and—

(2) an obligation to add personally (?) the balance footings upon the depositors' ledger—

and it involves also the assumption of a *necessary* result; viz.:

(3) that such an examination of the depositors' ledger would *necessarily* have resulted in the discovery of Coleman's stealings.

If any *one* of these three things is non-existent, then the finding of liability must fall. And it is clear that not only one, but every one, of them is non-existent.

(1) THERE IS NO AUTHORITY IN LAW OR IN FACT FOR THE PROPOSITION THAT AN EXAMINATION SHALL BE MADE ON A DAY CERTAIN.

The National Bank Act has no requirement of *any* examination by the directors at any time.

The by-law invoked (III, 1373) merely calls for the appointment of a committee "every six months . . . whose duty it shall be to examine."

The custom of the bank, as shown by the testimony of the directors, fixed the time for examination only as "once in six months" (Gale, III, 1251), "twice a year," usually in "March and September" (S. Dresser, III, 1307, 1330). Earl testified: "not very regularly" (I, 304), "twice a year" (I, 324), and (perhaps inferentially but very vaguely) "ordinarily before dividends were declared," which was the last of March and of September (I, 324).

Examinations actually made were on November 16, 1908 (six weeks after a dividend was declared) and on March 30, 1909 (the day on which a dividend was declared).

Certainly there is nothing here to justify the finding of any requirement of an examination on a day certain (with an attendant penalty of $283,000) nor, *if* on a day certain, on *that* particular day of September 30, 1907, presumably selected by the judge because a dividend was declared *on* that day.

It may be noted in passing that, if the examination in the fall of 1907 had happened to be made later, as it was in 1908, and had been made on November 14, 19, 21, 25, 26, 29, December 2, 5, or 9, and if the directors had then added the balance columns on the depositors' ledger, as the judge says they should

have done, they would have found no discrepancies (Fraser, III, 1105-1106); and also that a similar examination the next spring on any day between April 21 and June 1 would have been equally unfruitful.

And yet, if the directors had made both these examinations in the exact manner prescribed by the judge and so had complied with all the requirements of the by-laws, they would nevertheless each have been liable for $283,000, because they did not happen to make their examinations upon the exact date which the judge without justification and in the light of facts then unknown has now arbitrarily fixed. The mere statement is enough to show the absurdity of the finding.

And as a matter of business practice such a requirement of examination on a fixed date would be most unwise and directly opposed to the whole theory of such examinations, which is that they should be made without notice and at unexpected times, so that they could not be prepared for by any dishonest employee.

Receiver Admits Finding Unwarranted.

And the receiver himself admits that there is no such requirement, for he says in his brief (194): "there is no reason whatever for the directors to have made their examinations, if they made any, on definite dates."

(2) THERE IS NO AUTHORITY IN LAW OR IN FACT THAT AN EXAMINATION SHALL INCLUDE THE ADDITION OF THE BALANCE FOOTINGS, OR OF ANY OTHER FIGURES UPON THE DEPOSITORS' LEDGER.

It is not contended by the plaintiff that any particular form of examination is legally prescribed for the directors to follow. Confessedly the requirement of this finding that they shall "Add the balance footings" is judge-made, and made in light of all the evidence in this case.

Just what was it necessary for Richardson to do to comply with it?

> (And before that question is reached it must appear that the duty "devolved" upon Richardson personally to take part in the examination, either by his appointment upon the committee to examine or by notification sent to him that a special meeting was to be held to make the examination at a definite time and place so that he might attend—and there is not a shred of evidence of either such appointment or such notice.)

Must he with his own eyes see the figures on Coleman's book, write them down with his own hand, and add them with his own head? Or could he rely upon Barber or Dresser to do it? Would he be responsible for their mistake in copying or in addition if by chance it happened to exactly counterbalance Coleman's manipulations and resulted in his stealings not being discovered? Could he rely on Earl's copying and addition? Must he see him do it, or would it be sufficient for Earl to tell him that he did it the

day before? Must Earl actually tell him in exact words, or is it sufficient that Earl has written the figures down and labeled them? Where can he draw the line? If the penalty of drawing it in the wrong place is $283,000, he is entitled to know just where the proper place is.

The district judge, by his discussion (I, 198) of the possible results of an examination on March 25, 1907, and his failure to find negligence as of that date, admits that it was *not* negligence for the directors to rely upon Coleman's incorrect footings of the several balance columns because an addition of these would have corresponded with the amount shown on the cashier's ledger; and then, by his finding negligence as of September 30, 1907, holds that it *was* negligence to rely on Coleman's addition of such footings. No basis for the distinction is suggested, and it is submitted that no logical one can be found. If Coleman was not competent to add the twelve totals together, he was not competent to add together the thirty-five, more or less, individual balances which go to make up each total, nor probably to make the calculations necessary to find those balances; if he was not trustworthy for one, he was not for any; in either case the examiner must go back to the originals, *i.e.*, the checks and deposit slips, and verify the entry of each—in other words, he must do all the bookkeeping over again.

Why should a director who was justified in relying upon Coleman, both as to integrity and ability, to make the footings of the balance columns on each of the twelve pages—and the judge finds that he was so justified—be penalized more than a quarter of a mil-

lion dollars because he relied upon him to make the addition of these twelve footings?

The whole structure of business is founded upon confidence, and without that banking, like every other business, must stop. As a practical matter a director of a bank must be able to rely upon the cashier to attend to the management of the details of the bank, and, in the absence of anything to arouse suspicion or distrust, cannot be expected to verify by the addition of figures upon the books or to look with suspicion upon reports made by the cashier.

(3) THERE IS NO CERTAINTY—AND VERY LITTLE PROBABILITY—THAT THE JUDGE-REQUIRED EXAMINATION OF THE DEPOSITORS' LEDGER WOULD HAVE RESULTED IN THE DISCOVERY OF COLEMAN'S STEALINGS.

It appears that, according to the figures now on the books, the total of the footings of the balance columns for September 30, 1907, was $20,000 more than the corresponding total due depositors as shown on Earl's book, and it is assumed that, if the directors had made an examination of the bank on that day and totaled these footings, they would have discovered that discrepancy. But there are two other assumptions involved in this one—

(*a*) that the figures now on the book are the ones which were there on September 30, 1907; and—

(*b*) that the figures now on the book are the figures that the directors would have found when they came to look at the book if they had then made an examination.

(*a*) This assumption is not justified. In view of the facility and frequency with which Coleman made changes by erasing, dropping, inserting, and changing over figures, as was best suited to meet the necessities of the moment, it may well be that some of the figures now on the books are not the same that were there on September 30, 1907. It would be impossible now to tell what, if any, changes had been made. (For testimony as to such changes and the impossibility of telling when they were made see II, 622, 671-674, 676, 744, 782, 788, 825, and III, 1155-1157; and for an illustration of the difficulty in discovering even that they had been made see the honest but mistaken belief of the district judge that no change had been made in Edwin Dresser's balance [I, 191], discussed on page 17 of this brief.)

It is submitted that in the light of this and other testimony a positive finding that the figures now on the book under date of September 30, 1907, were there on that date could hardly be sustained.

(*b*) But more important still, and absolutely conclusive against the assumption that discovery would have resulted, is the *certainty* that the directors would not have found upon the books under date of September 30, 1907, the figures which are now there.

Can any one who knows how Coleman "fixed" his book in preparation for the bank examiner's examinations and has read Coleman's account of how he covered up a shortage of $230,000 under the very nose of Pepper, an experienced bank examiner (III, 766-799), believe for a moment that he would have been any less successful in concealing a shortage of $20,000 from a group of unskilled, unsuspicious, and inex-

perienced directors? Especially in view of the very simple way in which he disposed of this very $20,000 a few days later by merely dropping a single balance (III, 1103) and got rid of the $9000 differences in addition by a couple of other changes (III, 1105). The Circuit Court of Appeals put it very mildly when it said (IV, 1656): "It cannot, therefore, be assumed as certain that the entries now found on the depositors' ledger as of Sept. 30, 1907, would have been found there as they now stand had the method of examination suggested by the Court been undertaken by the directors on that date." They would have been fully justified in saying: "It *can*, therefore, be assumed as certain that the entries now found on the depositors' ledger as of Sept. 30, 1917 would *not* have been found there."

Thus not only one, but every one, of the assumptions upon which the decision rests is seen to be unfounded, and, as every one of them is essential to the decision, it cannot stand.

The Shrinkage of Deposits.

In addition to the general finding which has been discussed, the district judge made another finding against the directors for a smaller amount, which was swallowed up in the larger one.

This finding was based upon the alleged warning given the directors by the apparent rapid decline of the deposits in the bank.

The importance as a factor in the case of this much-talked-of shrinkage of deposits is by no means proportionate to the prominence given it by the plaintiff. It did not extend over the whole period of

Coleman's stealings from 1906 to 1910, but is confined, even on the plaintiff's contention, to a time subsequent to the middle of 1909.

The deposits as shown by the general ledger, which was the information before the directors, fluctuated widely from day to day, almost always by thousands, often by ten thousand, not infrequently by twenty thousand, and once, July 9, 1909, by forty-five thousand (Fraser, III, 1094-1126; Master, I, 49-53; and Exhibit 56, III, 1409-1431). With such legitimate fluctuations, a wide range of totals is not startling, and until the deposits got below the low mark of 1908 ($277,358.88 on June 27), which was not until after October 21, 1909, there was not any notice-compelling shrinkage. The Circuit Court of Appeals, therefore, was right in suggesting that it was about the last of October before there was any shrinkage which the directors must have regarded as abnormal (IV, 1662).

There is not a particle of evidence that Richardson knew of this shrinkage. As it occurred during the time when he was at home or in the hospital with a broken knee-cap, it is fair to assume that he did *not* know of it, and consequently that he had no warning that he neglected to act upon.

But the plaintiff may claim that in some way knowledge should be imputed to him; that he *ought* to have known it, and that therefore he ought to have suspected dishonesty and discovered Coleman's stealings.

Assuming such imputed knowledge, there is still no basis for finding Richardson negligent.

It is undisputed that the bank was in active com-

petition with two newly organized trust companies
n the immediate vicinity under the leadership of
ounger heads and aggressive management. It is
lso undisputed that in the judgment of the cashier
Earl), of the teller (Paul), of the president (Dres-
er, Sr.), and of the directors (Gale, Dresser, Jr.,
nd Barber), all business men familiar with local
usiness conditions, with their own funds heavily at
ake, this competition was an adequate explanation
f the shrinkage. It would be a brave man indeed
ho, absolutely ignorant of local conditions and
eryday business in the vicinity, would say that their
nanimous opinion was utterly unreasonable, and
ho, basing his opinion on after-discovered and then-
nsuspected facts, would say with absolute certainty
at they ought to have suspected dishonesty within
e bank. The master, who came the nearest that an
tsider ever can to the situation as it was presented
these directors for their action, was not willing to
ke that view, nor were the members of the Cir-
it Court of Appeals after a careful examination
the printed testimony. The district judge alone
s so decided, and thereby, as in other particulars
his opinioin, shown his unfamiliarity with banking.
Falling off in the deposits of a bank never, before
s case, was considered evidence of dishonesty. It is
, as the district judge says, a case where "funds
rusted to their care were diminishing"; it is, on
contrary, a case where the public is no longer en-
sting funds to their care, but is presumably en-
sting them to the care of some one else.
f it were so clearly an indication of dishonesty
hin the bank that the directors should have recog-

nized it as such, then, of course, men engaged in active banking life would have so recognized it at sight; it would have been far more suggestive to them than to the ordinary director. And the most significant feature of the whole case, and the most complete answer to the plaintiff's contention in this particular, is that the exact situation was presented to two active bank men, presidents of Boston banks, Josiah H. Goddard and Charles G. Bancroft, and in the face of it they bought stock in order to qualify as directors, and came onto the directorate, when the deposits had fallen not only to $285,000 (the amount on September 30, from which date the judge holds the directors liable), but to $153,000.

And yet *this* shrinkage in deposits did not suggest to them, nor to Bancroft's friend Jones, president of the New England National Bank of Boston, whose wife was a considerable stockholder, any dishonesty within the bank. These three bank presidents never thought of anything of that kind; they checked up the assets, but it did not occur to them any more than it had to Pepper, the expert bank examiner, the month before, when deposits were $167,000, that Coleman's book was the evident place to look.

The preposterous claim by the receiver that the defendants, business men, not (with the possible exception of E. Dresser, Sr.) to be classed as banking men, must under penalty of some $200,000, recognize this as a symptom of dishonesty, when four outside trained bank men did not so recognize it, found little favor with the master or with the Circuit Court of Appeals, and should find as little favor in this court.

The Puzzle of the Checks.

The finding by the district judge (209) that, if the directors "had called for and examined the checks that were in the bank, they would have discovered the large checks appearing on the slips of the National Union Bank were missing and would have learned of Coleman's irregularities," and that, because they did not do so, they are liable for some $180,000, is most astounding.

From a practical standpoint it is ludicrous to suppose that any mere director would have discovered from an examination of the checks in the bank the fact that some checks were not there; much less would any director have discovered that all the checks which he did not see had come in from the Clearing House and through the National Union Bank. An expert, given the exact problem and unlimited time, could perhaps have found out just what checks cashed since checks were last returned to depositors were missing and from what banks they came. And when he had learned all this he would still be a long way from the key to the mystery. But that a fall in deposits would suggest to a bank man the solving of any such Chinese puzzle as a practicable method of finding out the explanation of the decrease is unthinkable. Certainly Fraser never tried or suggested it.

It appeared that after the Clearing House checks were checked up with the small slips they were at once sorted alphabetically (I, 300); that at the end of the day's business all the checks were sorted into boxes (I, 301); and that several times a month the checks which had already been sorted alphabeti-

cally were again gone over, and those of each depositor put together for delivery at the end of the month (I, 320-321); and that "there was a great bunch of checks usually" (I, 300) each day from the Clearing House alone. The situation with reference to the checks, therefore, is this: At the very outset of the day's business, probably by the time the bank was open for customers, the Clearing House checks had been intermingled so that it would have been a considerable task to have identified each with its proper small Clearing House slip. During the day there was no occasion to keep them separate from the counter checks, and at the end of the day all checks were put in the A, B, C, etc., drawers, and so mingled with those of previous days already there. And then, once a week or so, all these checks were sorted according to depositors, and again hopelessly intermingled.

Now picture the scene required by the district judge. A directors' meeting with Messrs. Dresser, Sr., Gale, Dresser, Jr., and Barber sitting around the table, and Earl at the end with his general ledger. The deposits have fallen off since last week! The bank is losing business! Why? Some one asks who are drawing out their money. Earl names some. One director, still unsatisfied, asks to see the checks. The drawers are brought in, with the checks that have accumulated since the first of the month, sorted alphabetically, perhaps in part according to depositors. "A great bunch" each day from the Clearing House alone; perhaps it is early in the month and there are only a thousand or so in all. The directors, one or all, start to look them over, and they look at every one. What is to suggest to them that there

is one (or ten or twenty) that is not in the drawer? There is no way for them to know, and no reason for the notion of any such possibility to enter their heads. They can tell, perhaps, if they know how, by looking at the back of any particular check that it came through the Clearing House. But how can they tell that a check the existence of which they do not even suspect came through the Clearing House? What is there in the mass of checks before them to suggest further investigation along those lines, or to require them under heavy penalty to know that by working out a Chinese puzzle, which they could not understand or solve, connected with checks of the very existence of which they have no idea, they would discover stealing which no one suspects? And yet, because they did not do this, they must be made penniless, unless perchance they are fortunate enough to have more than $180,000 saved up against a rainy day.

This smaller finding, therefore, is no more to be sustained than was the larger one, and even less so, if that be possible, so far as Richardson is concerned.

Plaintiff's Specifications of Negligence by Richardson.

The plaintiff, on page 85 of his brief, furnishes the specifications of his charge of negligence against the various defendants, and it may be worth while to consider them *seriatim*, so far as they affect Richardson.

No. 1. Is not charged against Richardson.

No. 2. "In retaining him [Coleman] as such bookkeeper without ascertaining how frequent

and careless were his mistakes—either not knowing or not caring."

This was a detail of management which, as was said in *Warner* v. *Penoyer* (*infra*), directors "may properly commit . . . to clerks and bookkeepers, and to the superintendence of the cashier."

No. 3. Is not charged against Richardson.

No. 4. "In causing no supervision to be kept over this young bookkeeper. Or, if it is seriously contended that they thought Mr. Earl was keeping some such supervision, in never ascertaining that Earl was doing nothing of the kind."

Is not in accordance with the testimony, which showed that Coleman had from January, 1904, kept the depositors' ledger under Earl's supervision so accurately that there had been no real complaint from depositors with reference to their balances (I, 315; II, 641-642). This also was a detail which the directors could properly leave to the cashier, and with which, in the absence of cause for suspicion, they were under no duty to concern themselves.

No. 5. "In being ignorant that Earl had violated the wise methods of his predecessor as cashier (Record p. 80), and was actually permitting the bookkeeper to open the Clearing House envelopes and take out the checks, Earl himself, for the most part, never seeing the checks or paying any attention to anything in the clearing except the total."

Again not in accordance with the testimony of Earl (I, 319): "That had always been the practice even before my time." And again a matter of detail not within the scope of the usual duties of a director.

No. 6. Is not charged against Richardson.

No. 7. Is not charged against Richardson.

No. 8. "In assuming, if they ever thought about it at all, that the bank examiner's necessarily rapid examinations twice a year, when they knew most of the time was spent by the examiner on the loans and the collateral, was the equivalent of an audit—no bank examiner or anybody else ever having made any such statement to any of the defendants, and their assumption being nothing but assumption—and making this assumption in the face of the fact that three of the defendants (E. D., G. W. G., and S. D.) knew that a real audit had taken seven or eight days' time of a competent man and his assistant, and at a time when the bank had fewer accounts than during the time when Coleman was bookkeeper."

There is no evidence that Richardson ever made any such assumption, nor is there any evidence that, if he did, such assumption resulted in any loss to the bank. Also there is no evidence as to what, if anything, Richardson knew about the detail of the bank examiner's examination of this bank, but he surely was justified in believing that the examiners made (as they both testified they did [III, 1197, 1233]), such examination as they, trained experts, considered nec-

essary to determine the condition of the bank, and in believing also, from the absence of criticism by the Comptroller of the management, that they had discovered nothing wrong with that.

While it does not affect Richardson, it is interesting to notice that the only particular in which an "audit" would differ from the bank examiner's examination would be that it would include a verification of the depositors' balances by correspondence or by calling in the pass books (Currier, III, 1214), something which the examiners are forbidden to do (III, 1245), and also that the much-vaunted "Wright audit" was not an "audit," for it did not include any such verification (III, 1436, A-D).

> No. 9. "In neither making nor causing to be made any investigation regarding the habits and methods of life of Coleman, a very young man, who held an important position in the bank, and part of the time two important positions, and for over two years was, as teller, daily handling considerable sums of cash, while his salary was at all times very small."

Admittedly nothing had come to Richardson's knowledge which should have made him suspicious of Coleman. As laid down in *Warner* v. *Penoyer*, directors "are not required to adopt any system of espionage over their cashier or any of their subordinate agents or to entertain suspicion without some apparent reason, and until some circumstance transpires to awaken a just apprehension of their want of integrity, have a right to assume that they are honest and faithful."

No. 10. Is not charged against Richardson.
No. 11. Is not charged against Richardson.
No. 12. Is not charged against Richardson.
No. 13. Is not charged against Richardson.
No. 14. Is not charged against Richardson.

No. 15. "In permitting numerous meetings of the directors to be skipped without adequate excuse."

Testimony does not show lack of adequate excuse; nor does it show that Richardson had any such control over his co-directors that he could make them attend meetings. The "omitted meetings" complained of were in May, June, and July, 1909 (Plaintiff's Brief, 74), at which time Richardson was in bed at home or at a Boston hospital with a broken knee-cap (III, 1287). He can scarcely be called negligent in not attending a meeting in Cambridge under these circumstances. Furthermore, the plaintiff admits (Brief, 74) that the holding of these meetings would have made no difference, so that, so far as this case is concerned, the omissions were immaterial.

No. 16. "In disregarding, for long periods and without any excuse, the express provisions of the by-law requiring semi-annual examinations by the directors, and comparisons to ascertain if the books were correctly kept."

There is no evidence that Richardson knew of the by-law. If knowledge is to be imputed to him, it must include knowledge of the modification of the by-law by long-established practice, both as to non-appointment of committee and of method of verification

of deposits by accepting as correct the figures furnished by Earl. If knowledge of custom cannot be imputed, then Richardson was entitled to rely on fact that he never received notice of his appointment on committee to examine the bank, and to presume that his fellow directors were faithfully performing their duty. The requirement of the judge-prescribed form of examination on the judge-fixed day is considered at length on pages 22-26, and shown to be unfounded.

No. 17. Is not charged against Richardson.

No. 18. Is not charged against Richardson.

No. 19. "In doing nothing particular as to investigating the causes while the deposits of the bank were apparently shrinking from about $368,000 to about $107,000, and in making no real investigation as to the cause or causes."

As far as Richardson is concerned there is no evidence that he knew of this shrinkage, and, as he was at home with his broken knee-cap from April until September, and most of the time until December, it is fair to assume that he did not. The matter is considered at length on pages 31-37.

The specification is unfair in choosing the extreme high point of deposits in January, 1909, and comparing it with the extreme low in February, 1910, the day the bank closed. No such contrast was ever presented to the directors at the time plaintiff claims negligence for which liability should follow.

No. 20. "In accepting totally unfounded guesses

of Mr. Earl and of the other directors of the bank as to the real causes of the apparent shrinkage, when any investigation would have disclosed how unfounded and out of line with easily ascertained facts these guesses were."

There is no evidence as to what, if anything, Richardson knew or accepted in this connection. The matter is fully covered in connection with No. 18 and elsewhere in this brief (pp. 32-34).

No. 21. "In having no audit or careful examination of the books of the bank after July, 1903, a period of almost seven years."

There is no requirement of law shown requiring any such audit or examination. They would have been "measures of unusual precaution, not imperative when there was no reason to distrust the integrity or efficiency of the cashier" (*Warner* v. *Penoyer*).

No. 22. Not charged against Richardson.

RICHARDSON NOT NEGLIGENT IN ACCEPTING ELECTION.

In addition to the general specifications of negligence just considered, the plaintiff in his assignment of errors as against Richardson (IV, 1704 (3) (*a*)) alleges that he was negligent—

"In being a director of the bank, knowing it was out of the question that he would be able to attend its directors' meetings, with any regularity, and in rarely attending the directors' meetings."

Richardson is not to be condemned for accepting an election as director. He was a large stockholder, owning eighty-five shares, and so had a considerable financial interest in the success of the bank. Cutting, who had been discharged as teller because of shortages in cash, October, 1905, but was re-elected a director in January, 1906, had failed in February, 1906, owing the bank some $3000, so that he was no longer desirable as a director. The Bank Act compelled the election of some one in his place. This person *must* own ten shares of stock absolutely, *must* be willing to serve, and *ought* to be desirable. Evidently there was not such a man among the stockholders of the bank, for in the preceding month, to get a successor for Hazen, who resigned, Mr. Dresser had to go outside and persuade Mr. Barber to purchase stock in order to qualify. Richardson was besought by Dresser to allow himself to be elected in order that the law might be complied with. Richardson objected that he was not physically able, nor would his business as teller permit him to attend directors' meetings. Dresser persisted, telling him that it would not be necessary for him to attend the meetings, and that they would hunt for and get a man to take the place as soon as possible. Richardson reluctantly consented, and was elected at the stockholders' meeting in January, 1907, at which the record shows there were present and voting only the other directors, viz., the two Dressers, Gale, and Barber. What was Richardson's duty? To decline and leave the president to find some less desirable man to fill the place; or to accept, trust the directors to keep their

word, and do the best he could? There can be but one answer. He should have done as he did.

What, if anything, Dresser did about another director does not appear; but Richardson sought to find the man.

When the annual meeting in 1908 came round the situation was the same. The same four directors were the only stockholders present at the meeting and they knew all the facts as to Richardson's probable inability to attend meetings. The questions and answers were the same, and Richardson was re-elected.

In 1909, however, things had changed. Richardson had got Goddard, an experienced bank man and president of a Boston bank, interested, and understood that he would be acceptable to fill the place. He was therefore even more justified in accepting an election, by the same stockholders as before, expecting that as soon as it was definitely settled he would resign, and Goddard would succeed him. But when the time came Dresser would not consent to Goddard's election, and Richardson, instead of resigning in anger, as he apparently would have been justified in doing, kept on and continued his efforts to get Goddard accepted in his place. He succeeded, and Goddard and his friend, Bancroft, another bank man, were elected at the 1910 meeting.

Richardson's work was done, and he sent explicit instructions that he should not be re-elected. But his instructions were disregarded. The number of directors for the year was fixed at seven, and he was re-elected on January 11, 1910. Again, what was he to do? There was talk of an immediate liquidation of

the bank (in fact it was in connection with the final negotiations for its sale to the Harvard Trust Company only a little more than a month after the election, that the defalcations were discovered), and rather than embarrass his friends he agreed to serve for a time.

Unquestionably Richardson wished many times that he had never accepted an election, but it cannot fairly be said that his action in accepting any one of the four elections was negligent or that it was from any point of view a proximate cause of the bank's losses.

Richardson did Not Violate Oath of Office.

The district judge (I, 202-203) intimates that he violated his oath of office as a director, but this is not so. This oath, so far as material, is (sec. 5147) "that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title." There is no suggestion of violation of the Bank Act in this case. The implication is that Richardson did not "so far as the duty devolved on him, diligently and honestly administer the affairs of such association."

The Act does not expect *every* director to "administer the affairs of the" bank in *all* respects. It expressly limits the duty by inserting "*so far as the duty devolves on him.*" And what duties did devolve on Richardson? No specific duties were given to him by the board. When he was elected by the members of the board, acting as stockholders, it was

understood that he would not be able to give much time to active management or to attend many of the directors' meetings. By so electing him the other members of the board in effect agreed that they would attend to the active management, and that duties in conflict with that understanding should not "devolve upon him."

The only specific duty which devolved upon him was that, in common with the others, he should try to find a proper fifth director. This duty he performed so diligently that, in spite of his handicaps and the opposition of Mr. Dresser, he secured not only one, but two men to join the directorate.

The aspersions of the opinion are therefore unfounded and unjust.

DISCUSSION OF LAW.

Thus far this brief has followed the example set by the opinion of the District Court, and discussed the question of Richardson's liability as a matter of fact, and paid no attention to the established law of the case as laid down by the decisions.

It is remarkable that in a case of this magnitude that court, although citing many cases to support its decisions on questions of procedure and survivorship, should utterly ignore the decisions bearing upon the merits of the case, and should overrule a decision of the Supreme Court of the United States without comment or attempted explanation.

Supreme Court Overruled by the District Court.

The leading, and practically the only, decision of the Supreme Court of the United States bearing on

the liability of national bank directors for losses caused by dishonesty of officials is *Briggs* v. *Spaulding*, 141 U.S. 432, decided in 1891. The decision of the District Court holding Richardson liable for Coleman's thefts could have been reached only by overruling *Briggs* v. *Spaulding*.

Circuit Court of Appeals Overruled by the District Court.

The only other important case bearing upon the subject is that of *Warner* v. *Penoyer* in the Circuit Court of Appeals for the Second Circuit in 1898, reported in 91 Fed. Rep. 587. This case also was overruled by the decision holding Richardson.

Both Cases Distinguished.

Both the Briggs case and the Warner case differ from the present case in one very important particular, which made them much more favorable to the plaintiff than the present case. The losses suffered by the banks in both those cases were largely due to loans to the cashier and his friends in excess of the amounts allowed by law—matters which would ordinarily be presented to and passed upon by the directors as a part of the business of the bank especially within their province. In the present case the losses were due to the secret stealings of the bookkeeper, a subordinate of the cashier, by methods concerned only with the detail handling of the bank's business, which were within the province of the cashier and would not ordinarily come to the notice of the directors in the usual course of business. These decisions

are, therefore, stronger for the defendants than might appear at first sight.

Briggs v. Spaulding.

A further examination of *Briggs* v. *Spaulding* shows the facts there to have been less favorable to the defendants than the facts in this case.

There the by-laws called for a monthly meeting, but "the meetings of the board were infrequent and perfunctory." "No meetings were held . . . except the annual meeting and meetings to declare dividends or on some special occasion." Here the by-laws called for a meeting "weekly, on Monday evening," and they were held weekly and on Monday.

There for years "the business of the bank has been conducted by the president." Here the same was true, except that the directors had gone through the form of ratification.

There the directors had confidence in the judgment and integrity of the president and the cashier. Also here.

There, too, they had a by-law 19, but there they never had *any* examinations; whereas here there was unquestionably one examination in November, 1908, and one in March, 1909.

There the directors were held *not* liable, and here, too—on facts more favorable to them—the directors should also be held not liable.

By-Law 19.

The decision of the District Court in this case clearly rested on the existence of by-law 19.

In *Briggs* v. *Spaulding* it appeared that—

> "Under section 19 a committee was to be appointed every three months to examine into the affairs of the bank, and report to the board."
>
> "It appears that the provisions of the by-laws were not observed . . ."
>
> "No . . . examination committee was appointed."
>
> "No committee had ever been appointed to examine into the bank's affairs, question its cashier, or compare its assets and liabilities with the balances on the general ledger. *So that this manner of conducting the business had been sanctioned by long continued usage.*"

It is clear that this language supports the contention of the defendants in this case that the custom of not examining the depositors' ledger in the course of examinations by the directors, even if it is not in accordance with the wording of the by-law—which is not admitted—"had been sanctioned by long usage" and to that extent superseded the language of the by-law.

Richardson's Ill-Health.

In *Briggs* v. *Spaulding* it appeared that at a meeting of the directors held on October 3, 1881, "a resolution was adopted giving Charles T. Coit the president, a leave of absence on account of ill health for one year."

It was contended that this should not be construed as excusing him from serving as director without resigning as such, but the court says:

"If such were the rule, we apprehend that moneyed corporations would find extreme difficulty in obtaining proper persons to act as directors. But it is not the rule. Mr. Coit was guilty of no want of ordinary care in acting upon the leave of absence, and is not to be held because he did not resign. Invalids are permitted to indulge in the hope of recovery, and are not called upon by reason of illness to retire at once from the affairs of this world, and confine themselves to preparation for their passage into another. There was here no neglectful abandonment of duty from October 3rd to December 11th, and the decree in favor of the administrators of Charles T. Coit was properly rendered."

By the election of Mr. Richardson as director with
ıe knowledge and understanding that, because of
is ill-health and his other business, he would be un-
ble to attend directors' meetings, the directors tac-
ly gave him a leave of absence to that extent, and
ıe principle above applied to Charles T. Coit should
applied to him—and with increasing force at the
me of each re-election, as the fact of his inability to
tend had been emphasized by his absence from
eetings during the preceding year.

The defendant Johnson in the Briggs case was also
ıfortunate in the matter of health:

"Very soon after [his election] Mrs. Johnson became perilously ill, and Johnson, through the extra strain put upon him, fell himself into such

> a physical and mental condition as incapacitated him from properly attending to business"—

and the decree in his favor was affirmed.

But the facts with reference to the defendant Francis E. Coit are so nearly the same as those with reference to Richardson that they cannot well be distinguished, and the decision in favor of Coit is conclusive of Richardson's right to a similar one.

> "Francis E. Coit . . . was elected a director May 20, 1881 to fill a vacancy created by the death of George Coit. He was at the time an invalid, and by reason of his infirmity in health unable to transact business, at least with facility. . . . He was re-elected January 10, 1882. The evidence shows that he had for many years been afflicted with rheumatism. So far as appears, Lee, Vought and Cushing were in good health, although Charles T. Coit was not, but the latter continued in the management of the bank down to the 3d of October. While it may be said that Francis E. Coit should not have accepted the position of director, and should not have allowed himself to be re-elected, yet upon the question of passive negligence the rule would be an exceedingly rigorous one which made no allowance for the person charged under such circumstances; upon the whole we do not feel called upon to question the decision as to him."

Richardson's health was such that he could not transact the bank's business, "at least with facility." He was re-elected. His co-directors were in good

health. His negligence, if any, was also passive. Moreover, he performed certain positive acts (which Coit does not appear to have done) in that he attended some meetings, kept in touch with the business of the bank by telephone and interviews, and performed the duty assigned to him of securing a substitute, by getting Goddard and Bancroft (despite the temporary opposition of Gale and Dresser, Sr.) to take his place on the board.

He is therefore in an even better position than was F. E. Coit, and is entitled to a decision in his favor for the whole period, on the grounds which exonerated Coit.

And he is entitled especially to freedom from liability during the time of his absolute incapacity after April 18, 1909, upon the principles applied to Charles T. Coit and to Johnson, as well as under the above ruling in favor of Francis E. Coit.

Absence from Meetings.

In addition to the foregoing reasons, the decision in the Briggs case as to the fourth director, Spaulding, would seem to require a decision in favor of Richardson. Spaulding accepted election as a director with the understanding that he should act only in an advisory capacity; had no knowledge of the by-law; never received notice of any meeting; was never appointed on any committee, nor requested to perform any duty; was told by Lee, the cashier and later president, that the bank was in good condition, and always supposed it was so. And he was held not liable.

Practically the same facts were true of Richardson,

except that Richardson did attend some meetings. The result should have been the same.

General Bearing of Case.

The foregoing discussion of *Briggs* v. *Spaulding* has been of its bearing especially on Richardson; but on the general question of liability of Richardson in common with the other directors it is equally conclusive in his favor.

It recognizes fully the right of the directors to leave the active management of the bank to the president and cashier, requiring of the directors only that they maintain such supervision as the necessities of the case would seem to ordinarily prudent men to require.

It expressly stated that—

> "they are not insurers of the fidelity of the agents whom they have appointed"—

and also that—

> "it must be made to appear that the losses for which the defendants are required to respond were the natural and necessary consequence of omission on their part."

Further, as to the duty of calling for an examination:

> "Certainly it cannot be laid down as a rule that there is an unvariable presumption of rascality as to one's agents in business transactions,

and that the degree of watchfulness must be proportioned to that presumption"—

and—

"nor is knowledge of what the books and papers would have shown to be imputed"—

and again—

"The alleged liability of the defendants is such that the facts must be examined as to each of them."

The facts in the present case, when tested by the principles above quoted and the discussion of them in the remainder of the opinion, show that Richardson, having had no suspicious circumstances brought to his notice, was under no duty to start an examination; that he had a right to rely upon the president and cashier, to whom the active business had been entrusted; that he was not responsible for the thefts of their employee; and that such thefts were not "the natural and necessary consequence" of any action of his, or any failure to perform any act required of him.

Warner v. Penoyer.

In this case also the bank was wrecked by the unlawful loans made and overdrafts allowed by the cashier, who had the implicit confidence of the directors, and to whom the management of the bank was entrusted. There was "not a particle of evidence that the directors were aware of the culpable actions of the cashier."

The president "visited the bank frequently, sometimes advised with the cashier about discounts, and, when the cashier was absent, signed drafts and authorized small discounts. He . . . never looked at the bank books. . . . He occasionally looked at some of the notes . . . He never investigated the assets of the safe. He relied on weekly statements prepared by the bookkeeper or cashier, and which he examined every Tuesday morning, and upon conferences with the cashier or clerks, to keep himself informed about the business and condition of the bank."

"The directors had an examining committee and a discount committee, but these committees only met at the semi-annual meetings of the board of directors." "The discount committee was composed of two directors and the president. One of these directors visited the bank two or three times a week, and approved such paper as the cashier asked him to consider. The other never acted."

The directors "did not at any time investigate, or cause an investigation to be made of, its resources and liabilities."

The bank had paid dividends regularly since it was organized in 1882 but the July, 1893, dividend was passed (why does not appear), and the bank was closed February 8, 1894.

The District Court dismissed the bill, and the Court of Appeals affirmed this action, as to the mere directors, but "with great reluctance" held that the members of the two committees were liable.

The opinion, written by WALLACE, J., contains the following statement of principles which led to the

decision, and which are particularly applicable to the present case.

DUTIES OF DIRECTORS AS TO DETAILS AND ESPIONAGE.

Where the directors "have acted in good faith and with ordinary diligence in exercising their duty of general control and supervision" (of the cashier)—

> "They are not liable for losses sustained through his malversations. They are not called upon to devote themselves to the details of the business management and may properly commit these to clerks and bookkeepers, and to the superintendence of the cashier. They are not required to adopt any system of espionage over their cashier, or any of their subordinate agents, or to entertain suspicion without some apparent reason, and, until some circumstance transpires to awaken a just apprehension of their want of integrity, have a right to assume that they are honest and faithful."

LOSSES MUST RESULT FROM DIRECTORS' OMISSIONS.

"Before they can be made responsible for losses which have occurred through the mismanagement or dishonesty of the cashier, it must appear that such losses resulted as a consequence of the omission of some duty on their part. If, in all probability, these would have occurred just the same, notwithstanding they had been ordinarily diligent and vigilant, there is no justice in shifting them upon the directors, and no principle of law to justify it. They are responsible for

their own acts and omissions, but not for those of co-directors in which they have not actively or passively participated. . . ."

No Duty to Make Examinations.

"They might have required periodical examinations of the books to be made by experts. They might have insisted upon verifying, by personal investigation from time to time, such details of the bank's condition as they ought to have known before declaring dividends, or as were required to be reported to the comptroller of the currency. And, if they had done so this falsification of entries and accounts would probably have been discovered, if not prevented. But these would have been measures of unusual precaution, not imperative when there was no reason to distrust the integrity or efficiency of the cashier. They are not to be deemed remiss because they did not resort to exceptional methods or because they relied on the cashier's supervision over the books and accounts, or because they reposed confidence in his reports of the amount and other clerical details of the assets and liabilities. They were under no duty to observe the extraordinary vigilance short of which a bank cannot be protected from the crimes conceived by a dishonest cashier. . . . and, in considering their conduct, we are at liberty to assume that the bank was visited and examined from time to time by those officers whose statutory duty it is to make a thorough investigation into all the affairs of such institutions and a full and detailed

report to the comptroller of the currency. Such investigations, however, cannot be expected to probe the value of the discounted paper of a bank."

MERE DIRECTORS NOT LIABLE.

"We are of the opinion that only those directors, including the president, should be held responsible for the losses, who were members of the discount and examining committees. . . . If the other directors were cognizant of the neglect of duty by these directors, the proofs do not show it."

BURDEN OF PROOF ON PLAINTIFF.

". . . the case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed, and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is not a correct theory. If it were, the cases would be few in which the directors of a bank, wrecked by the misconduct of a cashier, could not be held accountable for all the losses. The Court cannot decree upon conjecture."

ABSENCE FROM MEETINGS NOT GROUND OF LIABILITY.

"As against two of the directors, the case for the complainant is predicated upon their failure to attend the semiannual meetings of the board. It is not a necessary or legitimate inference that this omission was a contributory cause of the losses. It does not follow, because a director has

failed to attend meetings, that he is legally or morally responsible for the disasters that may have befallen his bank. In the present case the board had provided for a reasonably vigilant supervision of the cashier. The cause of the losses was the neglect of those who had been appointed to keep watch of the discounts. Those directors who attended the meetings, and had no reason to suppose that the members of the discount and examining committees were neglecting their duties, are not responsible for the losses, which are solely attributable to such neglect. The directors who did not attend the meetings are in no worse category. What could they have done or prevented, exercising common diligence, if they had been present? A director who has failed to act is not liable for the thefts or shortcomings of the cashier, unless it appears, inferentially at least, that his omission had some proximate relation to the losses."

THIS CASE ALSO EXONERATES RICHARDSON.

The application of the principles thus stated by the court would clearly require a decision in Richardson's favor.

He acted in good faith, had no cause for suspicion, was given no specific duties by appointment upon a committee, was not cognizant of any neglect by his co-directors or by the cashier, and **there is no evidence that and absolutely no reason to suppose that, if he had attended every regular meeting of the board, Coleman's stealings would not "in all probability . . . have occurred just the same."**

Richardson Entitled to Rely on These Decisions.

The two cases above discussed having stood for so many years unreversed by court or Congress must be taken to be the law of the land, and to state the duties which Richardson undertook when he allowed himself to be elected a director. He was entitled to rely upon the law as thus laid down, and should not now have added responsibilities contrary to these decisions imposed upon him.

Bowerman v. Hamner.

The case of *Bowerman* v. *Hamner* (250 U. S. 504), which has been decided since the decision of the instant case by the Circuit Court of Appeals and is the latest case bearing upon the liability of a director of a failed bank, contains nothing which would necessitate or even justify the holding of Richardson liable.

The circumstances in connection with Bowerman are so very different from those in connection with Richardson that there is hardly any similarity, and the case has practically no bearing on the instant case.

Bowerman, a banker of experience and wide reputation, assisted in starting a new bank, took two fifths of the stock, contributed to public confidence in the bank by the use of his name, but did absolutely nothing to see that it was started right, and in the whole five and one half years did not attend a single meeting nor apparently communicate with it in any way, although he admitted knowledge of the "very hazardous manner of conducting the bank" and the necessity for change in various matters.

Richardson, a mere bank clerk, not shown to be

used to the business of banking, unknown to the public and therefore in no way contributing to the general confidence of the public in the bank, accepted under protest a position on the directorate of a bank which had more than forty years of successful life behind it, and had for years been in charge of and succeeded under the existing management; was assured that he need not attend directors' meetings, but did attend enough meetings the first year to satisfy himself that the bank was running smoothly and the loans were well looked out for and thereafter attended a few meetings and kept in touch with the affairs of the bank by telephone and by interviews with the president and another director and performed the duty which was assigned to him, viz., to find a suitable man to take his place.

But entirely aside from these differences, which are enough to make the Bowerman case no precedent in the instant case, is the great and fundamental difference that in the Bowerman case the losses were occasioned by "utter disregard of the national banking laws and of the by-laws of the association" in mismanagement of loans, overdrafts, and dividends, which were matters peculiarly within the province of the directors, mismanagement "of such a character that even slight care in the discharge of his duties as a director must have led Bowerman, an experienced banker, to discover the trend of the management and to have prevented the greater part, if not all of the losses which resulted in the failure"; whereas in the instant case the losses were due not to any disregard of the banking law or of the by-laws of the bank, but to the secret stealings of a subordinate,

concealed by false entries upon his books, a portion of the bank management peculiarly *not* within the province of the directors to consider or discuss; and there is no reason to suppose that Richardson's attendance at every meeting would have led him to discover what the cashier and teller (both in constant attendance at the bank, and the latter frequently having occasion to look at Coleman's book), the president (in daily attendance at the bank), and the directors (attending the directors' meetings every week) never even suspected.

It is clear, therefore, that the Bowerman case is no authority for holding Richardson liable in the instant case.

These decisions in the Federal courts, bearing so directly upon the issue in the present case, and calling for a dismissal of the bill as against Richardson, make further citations unnecessary in this brief.

Summary.

The contentions of these appellants as to the liability of Richardson may be summarized as follows:

(1) The master's report dismissing the bill should be confirmed, because—

(*a*) it is conclusive as matter of law; and—

(*b*) is amply sustained by the evidence.

(2) The decision of the District Court should not be affirmed, because—

(*a*) it is contrary to the evidence;

(*b*) it sets up a standard of care not justified by either fact, custom, or law;

(*c*) it bases this standard upon its interpreta-

tion of the exact wording of a by-law adopted more than forty years before, and shown to have been either otherwise interpreted and acted upon by the directors or to have been tacitly repealed by usage (contrary to the ruling in *Briggs* v. *Spaulding*);

(*d*) it requires that the directors make an examination semi-annually (contrary to the decision in *Warner* v. *Penoyer*), on a day certain fixed arbitrarily by the judge (contrary to custom and reason), and in a certain manner, determined by the judge arbitrarily;

(*e*) it assumes that, if such examination had been made, Coleman's stealings would have been stopped, such assumption, being based on a misstatement of evidence, being at best a mere conjecture, and being contrary to the probabilities as indicated by the evidence;

(*f*) it gives no sufficient weight to the entire absence of suspicion of Coleman;

(*g*) it contains so many statements in direct opposition to uncontradicted testimony and the direct evidence seen and accepted by the master and counsel for both parties as to show that very material portions of the evidence were either not read or not understood, and to discredit not only the conclusions based on these misstatements but the entire decision;

(*h*) it makes no distinction between the liability of the different defendants, although the circumstances are materially different as to each, and the liability is individual;

(*i*) it fails to give sufficient weight to the facts

—that the bank was examined semi-annually by trained experts sent by the government to see that the affairs of the bank were being properly conducted; that they did not discover Coleman's stealings or anything else to arouse their suspicion, and after each examination told the bank's officers that everything was all right; and that no complaint (on any point here material) was ever received from the comptroller's office after the receipt by it of the reports of these examiners.

(3) The unanimous decision of the Circuit Court of Appeals dismissing the bill as to Richardson should be affirmed, because it is the only decision possible consistent with the law and the evidence.

(4) The bill should be dismissed as against Richardson because no negligence on his part has been shown:

(*a*) He accepted election under protest, as an emergency measure, with a distinct understanding that he could not and would not be expected to attend directors' meetings or take an active part in the management.

(*b*) Under these circumstances his election and re-election by the directors was a tacit agreement by them that they would attend to the active management of the bank, upon which he was entitled to rely in the absence of any reason to suppose that they were not properly attending to it.

(*c*) He labored continuously to do away with the necessity for his service; succeeded in getting Mr. Goddard to agree to serve, only to

have him rejected by Mr. Dresser; but by persisting in his efforts he finally got both Mr. Goddard and Mr. Bancroft upon the board; no other specific duties devolved upon him or were imposed by the directors.

(*d*) He had no knowledge of any fact which should have aroused any suspicion of Coleman's honesty or the bank's safety. There was no reason, therefore, to cause him to ask for an investigation or examination. He was under no duty in that respect.

(*e*) He did not, so far as appears, know of any shrinkage in deposits; but if he did, that was no indication of dishonesty or ground for suspicion. In no previous instance had stealing from a bank been indicated in that way.

(*f*) His health was such throughout the period that he was not physically able to take part in the active management of the bank, and he therefore is not liable for his failure so to do. In this respect he stands for the whole period exactly in the position of Francis E. Coit in *Briggs* v. *Spaulding*—in much the same position as Charles T. Coit, having a tacit partial leave of absence from the directors—and for the period after he broke his knee-cap, *i.e.*, practically all the time after April 18, 1909, he is in the position of Charles T. Coit or of Johnson, taking an involuntary leave of absence.

(*g*) He is liable in any event only for the probable and necessary results of his own failures, and there is nothing to show that

Coleman's stealings or the continuance of them was in any way consequent upon any failure of duty on his part.

(*h*) Upon all the evidence no duty devolved upon him to take action other than that which he took, and no loss resulted from any breach of duty by him.

These defendants, appellees, confidently submit, therefore, that the decision of the Circuit Court of Appeals should be confirmed, and a decree entered dismissing the bill as to them with costs.

CLARENCE ALFRED BUNKER,
In behalf of self and co-administrator.

Supreme Court of the United States.

October Term, 1918.

No. 538.

JOHN L. BATES, Receiver of the National City Bank of Cambridge, Massachusetts, Appellant,

v.

SUMNER DRESSER, Administrator of the Estate of Edwin Dresser, Deceased.

No. 539.

SUMNER DRESSER, Administrator of the Estate of Edwin Dresser, Deceased, Appellant,

v.

JOHN L. BATES, Receiver of the National City Bank of Cambridge, Massachusetts.

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JOHN M. DEAN, Executor of George W. Gale, Deceased, SUMNER DRESSER, and DAVID A. BARBER.

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Brief for John L. Bates, Receiver of the National City Bank of Cambridge, Massachusetts.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Brief for John L. Bates, Receiver of the National City Bank of Cambridge, Massachusetts.

History of the Litigation.

A brief statement of the history of the litigation before the general statement of facts, section II of this brief, will be helpful. John L. Bates of Boston was appointed receiver of the National City Bank of Cambridge on February 23, 1910. Investigations showed the bank had been systematically robbed for several years by its bookkeeper, George W. Coleman, who for over two years had also been its paying and receiving teller, his total thefts aggregating, as subsequently ascertained, $310,143.02. On November 3, 1910, the receiver filed his bill of complaint in the United States District Court for the District of Massachusetts against Edwin Dresser, president and director of said bank, and David A. Barber, George W. Gale, Sumner Dresser, and George E. Richardson, four other directors of said bank, alleging that the great bulk of the thefts was chargeable to their negligence as president and directors. Answers were filed and the case referred to Robert O. Harris as special master. Thirty-five hearings were held before the special master. He subsequently filed his report (Record, p. 29), in which report he found and ruled in favor of all the defendants. The plaintiff, the receiver, filed exceptions to this report (Record, pp. 103-160). Although the report was in their favor, the defendants also filed exceptions (Record, pp. 160, 162). These exceptions were never called to the attention of the District Court and were treated by it as waived (Record, p. 172). The entire evidence was reported by the special master,

in accordance with the decree by which he was appointed, and, condensed by agreement of counsel, appears in the record, pages 289 to 1643, inclusive. This condensation was duly approved by the District Court (Record, p. 1643). Plaintiff's exceptions to the special master's report were subsequently argued before Judge BINGHAM of the United States Circuit Court of Appeals for the First Circuit, sitting, however, in this matter, as a judge of the District Court. Judge BINGHAM filed an opinion (Record, p. 175) in which he reviewed the facts and the law at very considerable length (229 Fed. Rep. 772). Judge BINGHAM sustained the exceptions of the plaintiff, the receiver, on almost every point, set aside substantially all of the conclusions of the special master on the controlling points, and found all the defendants responsible to the plaintiff for the sum of $283,218.20, and costs amounting to $4262.03, and the final decree of the District Court (Record, p. 172) held all the defendants accordingly. The final decree was appealed from by the several defendants to the Circuit Court of Appeals for the First Circuit, and assignments of error filed (Record, pp. 214, 236, 254, 270).

The appeals were argued in that Court, and the majority opinion (Record, p. 1647) by DODGE, J. (concurred in by ALDRICH, J., judge of the United States District Court for New Hampshire, sitting as judge of the Circuit Court of Appeals), reversed the decree as against all the defendants except Edwin Dresser, and modified the decree against him (250 Fed. Rep. 525). He had died pending the litigation, and his administrator, Sumner Dresser, an individual defendant, also defended as administrator of Edwin Dresser's estate.

The Circuit Court of Appeals ordered the bill dismissed as against all the defendants except Sumner Dresser, administrator of the estate of Edwin Dresser, and reduced the amount for which the said estate was held liable from $283,218.20 to $264,088.02 (Record, p. 1676). The amount arrived at, $264,088.02, is ascertained by taking the figures of the shortage, which appear in the special master's report (Record, pp. 81, 82), and adding the figures of the defalcations from December 1, 1908, to the close of the bank. An opinion, dissenting in part, was filed by Judge Brown of the District Court of the United States for Rhode Island (Record, p. 1666), who sat in the case as a judge of the Circuit Court of Appeals with Judges Dodge and Aldrich.

The final decree of the Circuit Court of Appeals as originally made contained no provision regarding the allowance of interest on the amount awarded the plaintiff, the receiver, from the date of the decree in the District Court. The plaintiff, the receiver, accordingly filed a motion to amend said final decree (Record, p. 1677) by adding interest on said $264,088.02, from the date of the final decree in the District Court, this item of interest exceeding $30,000. The same Circuit Court of Appeals reassembled, and arguments were made on this motion, and same was subsequently denied, the opinion being by Judge Aldrich (Record, p. 1673) (250 Fed. Rep. 552).

From the final decree of the Circuit Court of Appeals three appeals, with accompanying assignments of errors, were taken by the plaintiff, the receiver, which appeals are now before this Court (Record, pp. 1679, 1695, 1703). The first, the appeal of the plain-

tiff, the receiver, from the decree of the Circuit Court of Appeals cutting down the amount awarded by the District Court against the Edwin Dresser estate and not allowing any interest; second, the appeal of the plaintiff, the receiver, from the decree dismissing the bill against the executor of George W. Gale, deceased, Sumner Dresser, and David A. Barber; third, the appeal of the plaintiff, the receiver, from the decree dismissing the bill against Clarence A. Bunker *et al.*, administrators of George E. Richardson, deceased. Sumner Dresser, administrator of the estate of Edwin Dresser, also took an appeal from the decree of the Circuit Court of Appeals, holding the estate of his decedent liable as above stated, and filed his assignment of errors (Record, p. 1686), which appeal is also now before this Court. It thus appears that the case has been discussed with more or less fulness (1) in the report of Robert O. Harris, special master, (2) in the opinion of Judge BINGHAM filed in the District Court, (3) in the majority opinion of Judge DODGE filed in the Circuit Court of Appeals, (4) in the dissenting opinion filed by Judge BROWN in the Circuit Court of Appeals, and that there was also a brief discussion concerning some of the features of the case in the opinion on the question of interest, filed by Judge ALDRICH in the said Circuit Court of Appeals.

Three of the five original defendants died after the bill was filed and before the case was determined in the Circuit Court of Appeals, and their legal representatives in each case have duly appeared.

In this brief, John L. Bates, receiver of the National City Bank of Cambridge, Mass., will be referred to throughout as the plaintiff, and the defendants by

their surnames, as a matter of convenience, omitting, except where necessary, reference to the death of the three deceased defendants, Dresser, Gale, and Richardson, and the appointment, etc., of their legal representatives.

Statement of Facts.

The primary facts are, with few and unimportant exceptions, not in dispute, although the conclusions to be drawn from the primary facts are in dispute. The facts as here stated are found in various parts of the record, in allegations of the bill admitted by the answers of the defendants, in findings made by the master and agreed by all parties to be correct, in evidence furnished by books, papers, and records of the bank, in admissions of counsel in the record, in admissions of the defendants in testimony, and in testimony of witnesses which has been received as true by all the parties or the correctness of which has been conceded by all parties.

It is practically impossible to refer to the record by book and page as regards each and every one of the facts recited. But if any facts recited as established by the record and unquestioned are in this Court controverted by the defendants, the references to the testimony relating to such facts can be readily got together and furnished. And if, prior to the arguments, the defendants, who will be furnished with copies of this brief in advance of the arguments, and as required by the rules of Court, shall notify the plaintiff's counsel of any claim that this brief wrongly recites any facts, the references will be marshaled and ready to furnish the Court at the time of the arguments.

In the few instances where primary facts are recited which are really in controversy, statements to that effect will appear in the brief, and, so far as possible, the references to the testimony will be given.

The specifications of error by the receiver which appear in the record, pages 1680, 1696, and 1704, may be summed up in a single sentence as follows: The Circuit Court of Appeals erred in dismissing the bill as against the defendants Sumner Dresser, Barber, the estate of Richardson, and the estate of Gale, and in modifying the decree against the estate of Edwin Dresser; said Court should as a matter of law on the entire record have affirmed the decree of the District Court against all the defendants with costs and interest.

The directors were of course at all times in charge of the bank's affairs, but the daily active business of the bank was managed by Edwin Dresser, president, and, as such, the executive head of the bank, and by a cashier, a bookkeeper, a teller (who acted both as paying teller and receiving teller) and a messenger. For a period of twenty-five months, October, 1905, to November, 1907, Coleman, then bookkeeper of the bank, also served as both paying and receiving teller, but, except for this period, the bookkeeper and the teller were always different persons.

By-laws were adopted at the time the bank was organized and, except for some immaterial changes, were in force during the entire period covered by the

transactions involved in the litigation. The most important provisions of these by-laws having any bearing on the matters in controversy were sections 16 and 19 (Record, pp. 1373, 1374):

"Minutes.

"Sec. 16. The Articles of Association of this Bank, and the returns of the judges of the elections, shall be recorded in the minute book, in which shall also be recorded the proceedings of the Board at all regular and special sessions.

"The minutes of each meeting shall be signed and attested by the President or Cashier."

"Examinations.

"Sec. 19. There shall be appointed by the Board, every six months a Committee whose duty it shall be to examine into the affairs of the Bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the Bank is in a sound and solvent condition: the result of which examination shall be reported to the Board at their next regular meeting."

For some years prior to July of 1903 one Davis was cashier of the bank, and also a director. It is not a point in controversy, but, so far as is shown, Davis appears to have been a competent cashier in every respect. In July, 1903, being in ill health, he tendered his resignation, which was accepted; and it was voted by the directors, on July 27, 1903, as appears by the minute-book, that an auditor should be

employed to make an examination of the bank's condition, as a new cashier was about to succeed Mr. Davis. Richard W. Wright, a competent Boston accountant, was accordingly engaged, and made a thorough examination into the bank's affairs. He made a full, written report (Exhibit 103), which appears in the record (pp. 1436A-1436D). The details of his examination disclosed by his report are not particularly important as the bank at that time was in excellent shape, but in his report he gave the board of directors explicit warnings regarding the importance of the deposit ledger, or book on which the bank kept its accounts with its depositors. He made some criticisms of the way the book had been kept, it being at that time in charge of the bookkeeper who left soon afterward and was succeeded by Coleman. He said:

> **"In going over the DAILY BALANCE book to prove same, it was found that the work on this book was very much behind, and it was impossible to prove the deposits as shown above. . . . In the opinion of the Auditor, a competent book-keeper should be employed on this work immediately. It is certainly unsafe to let this book go a day with errors not found. . . . I do not find the DAILY BALANCE book in proper order, and am not satisfied with such verification as I am able to make."**

At or about the time that this audit of the bank was made, and Mr. Davis retired as cashier, the bank engaged Mr. Frank L. Earl as cashier, to wit, July 30, 1903. Mr. Earl at this time was a man about forty-nine or fifty years of age. The plaintiff contended that the employment of Mr. Earl as cashier

was of itself negligent, it appearing that, although Earl had worked in the bank doing miscellaneous work and as assistant to Mr. Davis for some six months, he had left a position in another bank, owing to some trouble in the bank, but no claim being made that Mr. Earl was in any way dishonest at any time (Record, pp. 312-313, 1184-1185). It further appeared that, although Edwin Dresser, the president, knew something about Earl's having had trouble in the other bank, he made no inquiries whatever regarding its nature or consequences (Record, pp. 1184-1185). The District Court found against the appellee on this question, namely, that there was no carelessness on the part of any of the defendants in the original hiring of Earl as cashier (Record, p. 210). The appellee saved no exception, and the point is not now important.

About the time Earl became cashier, Coleman, then seventeen years of age, came into the bank as messenger, and from July, 1903, to January, 1904 (Record, p. 179), performed the ordinary duties of messenger. He had taken a course in a business college after leaving the public school, and the bank paid him at the rate of $4 per week.

On January 1, 1904, the man who had been bookkeeper up to that time left the bank's employ, and Coleman, then not quite eighteen years of age, was made the bookkeeper, and the deposit ledger was put in his charge.

To sum it up, Coleman, the bank's messenger, at not quite eighteen years of age, and at a salary of $4 per week, was put in charge of the book regarding which the auditor a short time before in his written report

had said, "A competent book-keeper should be employed on this work immediately. It is certainly unsafe to let this book go a day with errors not found." Coleman remained in charge of this deposit ledger until the bank closed, making many hundreds of false and fraudulent entries therein, and also many other errors not of a fraudulent nature, and without any effective supervision whatever on the part of any one during the entire time. This last statement is not, as plaintiff understands, admitted by the defendants, but it is true, as will appear when the matter is taken up later in this brief in some detail.

At the time Coleman became bookkeeper one Roaf was receiving and paying teller, and one Lockhart, a boy fifteen years of age, succeeded Coleman as messenger (p. 862). As bookkeeper Coleman had no duties requiring him to handle cash.

There was no cage in the bank, and the teller's cash was to some extent accessible to others in the bank behind the counter, if the teller had occasion to leave his window at times for a few minutes.

During a short period prior to May, 1904, Roaf, the teller, found his cash short on four or five occasions, the total amounting to $1172.85. One mistake of his was found by Mr. Wright, the auditor who was called in, but this accounted for $200 only (though appellants may claim errors of $450 were traced to Roaf—Record, pp. 847, 848). As to all over $200 Mr. Roaf, who was a man of considerable experience and undoubtedly honest, disclaimed any responsibility. To avoid trouble he paid a part of the loss, resigned, and left the bank.

He was succeeded by one Charles L. Bragg as

teller, Bragg coming to the bank in April of 1904. In June of 1904 a shortage of $50 in cash sent to Boston occurred, which was never explained; and when Bragg left the bank, which he did voluntarily in February of 1905, he counted his cash and found it correct. He requested the president to verify it, and the latter refused. Later on, the cash being counted, it was then found $25 short, and Bragg, though denying responsibility for this shortage, was compelled by the president to pay one half the same. No question as to his honesty was raised.

Bragg was succeeded by Louis W. Cutting as teller. Cutting was also elected assistant cashier, and became a director. Cutting was an experienced bank man, and in the spring and summer of 1905 four shortages of $100, $20, $100, and $475, respectively, occurred in his cash. Cutting disclaimed responsibility, but was held responsible by Edwin Dresser and Gale and Sumner Dresser, then members of the board of directors, and was obliged to settle, which he did by giving his note for $700, and subsequently paying the same. *Cutting denied that he took the money, and gave warning to Mr. Dresser that, in his opinion, there was a thief in the bank, and that measures ought to be taken to catch him.* He gave no names, and his warning was ignored. No question as to Cutting's honesty was raised (pp. 881-887).

When Cutting left, October 7, 1905, Coleman—at whose suggestion it does not appear—was made paying and receiving teller as well as bookkeeper. He continued to hold both positions until November, 1907 (Record, p. 1362).

At no time during his entire connection with the bank did he receive over $12 a week salary.

It appears by the evidence that when Coleman was made bookkeeper in January, 1904, he was given the combination to the main vault. Coleman also testified (Record, pp. 470, 471) that he could not give the exact date, but it was about two years after January, 1904, that he was given the combination of the cash-box, and this was not disputed. It seems probable that he was given the combination of the cash-box when, as teller, it became necessary for him to handle cash at his teller's window in banking hours (see Record, p. 316). But, in any event, he got this combination soon after, for it appears that on May 24, 1906, he entered the bank after business hours (having also the key to the front door), opened the vault, opened the cash-box, took out $2000 in money, lost or disposed of the same in some way, and, becoming frightened, procured the amount from his father, and restored it to the bank the next day (Record, p. 185). No one in the bank knew of this act.

In February, 1906, just before his twentieth birthday, he opened a small, personal account on the books of the bank. His first stealings, disclosed by false entries upon the books of the bank and included in the shortage existing at the time the bank failed, occurred November 24, 1906 (p. 185). The moneys taken at this time may have been taken in one of two ways, *i.e.*, Coleman may have got the money out of the bank by merely pocketing it at his teller's window and then concealing it on the books, or he may have got it by the Clearing House method, so called, which method had been devised by him as early as November, 1907,

because of his discovery of the carelessness of the cashier as regards the bank's dealings with the Boston Clearing House (Record, p. 186).

Checks drawn on the National City Bank and deposited in any Boston bank (except the National Shawmut and the First National), or which came into the possession of any Boston bank for collection (except the National Shawmut and the First National Bank), were collected through the Boston Clearing House. The bank which held such a check, when sending it for collection to the Clearing House, would send with it a slip showing the amount of the check in detail, as also the amounts of any other checks on the National City Bank which were likewise to be collected, and, if there was more than one such check, showing also at the foot of the details the total of the checks thus to be collected. This is called throughout the record the small Clearing House slip.

On the same day the Clearing House would receive similar slips from other Boston banks (not including the National Shawmut and the First National) which had items to be paid by the National City Bank, with the items (checks) themselves. The Clearing House would then make up what is called the large Clearing House slip, one of which is printed in full in the record (pp. 1380, 1381), and this large Clearing House slip, with all the small Clearing House slips and the items (checks), would be mailed, on the day the same were received from the banks sending them, by the Clearing House to the National City Bank of Cambridge.

In Exhibit 4 (Record, pp. 1380, 1381), for example, the figures $113.89 were represented by a small Clear-

ing House slip sent by some Boston bank to the Clearing House with items for collection, the total of which made up that amount. Sometimes there was but one item; sometimes several. And the total of all the items on that large Clearing House slip amounted to $5577.94. All figures appearing below the total of $5577.94 were written on the large Clearing House slip by Mr. Earl after that large Clearing House slip, with the small slips and the items, came into the National City Bank.

If there was no check to be returned unpaid, by reason of insufficient funds, defective endorsements, or similar reason, in the course of the day on which the large Clearing House slip was received the cashier would draw and send to the Clearing House the check of the National City Bank drawn on its Boston correspondent, the National Shawmut Bank, for the full amount demanded. This check would be paid the following morning, and the Clearing House, having thus received the funds, would credit or distribute them to the banks which had sent in the several items. And in this way all the checks which had come in from the Clearing House would be paid in full to the banks which had sent them in.

Taking up the further items on Exhibit 4 (Record, p. 1381), it appears that this large Clearing House slip was sent by the Clearing House December 24, 1909, which means it was received by the National City Bank on Monday, December 27, 1909, the next business day, December 25 being a holiday and December 26 a Sunday. And on December 27 the National City Bank sent to the Clearing House its check on the Shawmut drawn to the order of the Clearing

House for $5574.26, and returned one item of $3.68, thereby settling with the Clearing House for all the items received from the Clearing House.

The other items show that the First National Bank sent, on December 24 (received on December 27), similar items, amounting to $2492.75, and the National Shawmut Bank also sent in for collection one lot of items, amounting to $805.32, another lot, amounting to $850.32, and that either the First National or the Shawmut sent in further items, amounting to $309.29. As against the items sent in by the Shawmut Bank there were returned, for some reason or other, two items of $5.10 and $3.51, making a total of $8.61, and the remaining demands were settled outside the Clearing House by credits to the Shawmut and direct remittances to the First (see Judge BINGHAM's Opinion, pp. 180-182). And the figures on Exhibit 4 (Record, p. 1381), $10,023.33, represent the entire amount paid out by the National City Bank on account of checks drawn on said bank and coming in for payment on December 27, 1909, except checks presented and paid over the counter.

In the record the amounts thus paid to the Clearing House and the First National and the National Shawmut on any given day are frequently referred to as the "Clearing House payments" to distinguish amounts so paid from checks paid over the counter, though technically only a portion of the amount (in the case of Exhibit 4, $5574.26) was paid to the Clearing House, the balance going to the First National and the National Shawmut. The master so treated them (Record, pp. 34, 35).

The payments made by the National City Bank to the Clearing House day by day, including the payments to the First and the National Shawmut, usually very considerably exceeded the amounts paid out over the counter.

The bulk of the money stolen by Coleman was stolen in the following manner: He would draw his own check on the National City Bank, usually for an even amount, and very frequently for $3000, payable generally to the order of some Boston broker, in most cases J. Thomas Reinhardt. Coleman's messenger would take the check to the office of the broker, usually to Reinhardt, who, in return for same, would draw his own check on a Boston bank, usually the National Union Bank, to the order of the messenger, generally for the same amount as the Coleman check. Lockhart, hereafter referred to, was usually the messenger, and, being known at the National Union Bank, he would take the broker's check to that bank and cash it. He would then return to Cambridge and give the money to Coleman.

This left the broker in possession of Coleman's check for $3000, or for whatever sum it had been drawn, and the broker at once deposited that check for collection in the National Union Bank. That bank sent the same to the Clearing House, at the close of the day's business, with its other items which were to be collected from the National City Bank and with its small Clearing House slip hereinabove described. The Clearing House would then mail that small slip with the items (including Coleman's check) and with its items from other banks and the small slips from the other banks and with the

large Clearing House slip, hereinabove described, containing the totals, to the National City Bank of Cambridge and request payment. All of these papers deposited in the mail in Boston that night would be in the box of the National City Bank at the Cambridge postoffice the next morning. The envelope containing all these papers and items would be taken from the postoffice to the bank either by Coleman, who had a key to the box, or by the messenger; and when the same arrived at the bank the Clearing House envelope would be opened by Coleman, and the items sorted *without the cashier's inspecting them.* Coleman at this stage of the proceedings would abstract his check and would supress the same and not charge it to his own account. The balance to his own credit was usually, if not always, very small. As bookkeeper it was left to Coleman to see that each check that came into the bank from the Clearing House was drawn against sufficient funds on the part of the depositor drawing the same, and was properly endorsed. Any check drawn against insufficient funds, no funds, or improperly endorsed, Coleman was expected to report to the cashier for him to return such check, or checks, and deduct the amount of the same in making the remittance to the Clearing House. In many cases there were no checks to be returned, and the remittance to the Clearing House was of the full amount demanded. Coleman, of course, never notified the cashier that a check of his own for an amount far in excess of any sum to his credit had come in through the Clearing House, and the cashier, taking Coleman's word that everything was all right, in the course of the day drew and sent the check of the National City Bank to the Clearing

House and paid the demands received as above stated.

When any check was paid, the assets of the bank were of course reduced by the precise amount thereof; but where checks had been properly drawn by depositors against sufficient funds, the liabilities of the bank were also diminished by the same amount. *As regards the fraudulent Coleman check thus paid, the bank's assets were diminished by the amount of the same, and, there having been no balance or but a small balance to Coleman's credit, and the check not being chargeable to any depositor's account with funds to meet it, the liabilities of the bank were not diminished, and the net result was a loss to the bank of the amount of Coleman's check thus paid.*

But the two sides of the bank's daily statement must correspond, and in order to accomplish this Coleman in most cases concealed by false entries on the deposit ledger the amount of each of his checks on which he got the money out of the bank in the way just described. The manner in which he made his concealments and fraudulent entries, the extent of the same, etc., will be discussed hereafter.

As above stated, the bulk of the $310,143.02 which Coleman stole from the bank was taken in this way. The exact amount so taken we do not know, and there is no means of determining, except inferentially; but on the whole evidence it seems pretty clear that between $275,000 and $280,000 of the money stolen was taken in this way. As to how the other money, some $30,000, was taken, the master makes no direct finding. The District Court, however, has made the finding (Record, p. 185) that he got this money (*i.e.*, the amount stolen prior to November, 1907) by simply

pocketing the cash, and the conclusion that this is true is on all the evidence practically irresistible, and for the following reasons:

Coleman, it is agreed by all the parties and found by both the master and the Court, was paying and receiving teller of the bank, as well as the bookkeeper, from October, 1905, to November, 1907. His first theft represented in the great shortage was November 24, 1906, when he stole the sum of $505 and concealed the same on his deposit ledger in the account of the Standard Action Company, charging it to that company's balance as if a company check to that amount had come in and been paid. At this time it was perfectly easy for him as teller to pocket this amount out of his cash drawer. It was also perfectly easy for him as bookkeeper to go to his ledger and conceal the theft by a false entry. The chance of detection was small. He did not require the aid of a messenger or have to run the risk of the cashier himself deciding to open the Clearing House envelope, and thereby perhaps detect a check or checks of his, Coleman's, for an amount more than his balance. It was a simple and easy method by which to accomplish what he immediately wanted, namely, to get the money.

The other method was cumbersome and much more risky, and the receiver argued that, while it cannot be proved with certainty, it is far more reasonable to believe he took the comparatively small sums which he took in the early stages of his stealings by this method than that he resorted at this time to the Clearing House method.

The defendants made no admission on this particular matter, but do not, as plaintiff understands,

seriously question the treatment of the matter by Judge BINGHAM in his decision in the District Court, where he says (Record, p. 185), referring to Coleman:

> **". . . Inasmuch as at that time he was both paying teller and book-keeper and, as paying teller, had the handling of the cash, it is far more probable that, as a rule, he took the cash rather than that he resorted to the check method of getting the money out of the Bank."**

The Court of Appeals takes the same view (Record, p. 1649).

In November, 1907, Mr. Paul, an honest and faithful young man, became paying and receiving teller, and Coleman's duties in that department ceased, as also his right actually to handle the cash. From that time it would have been dangerous for him to have taken even $100 from the teller's cash, because, at the end of the day's business, Paul would have found a discrepancy, and there might have been trouble. Certainly there would have been inquiry, and to take large sums from the teller's cash was altogether too risky to be thought of. Consequently, *from that time* he resorted to the Clearing House method only, having discovered how to use it, as the master finds, prior to Paul's becoming teller; and Paul therefore never had any trouble, so far as the evidence discloses, with his teller's cash.

At this point, and in order that the Court may fully understand certain references to the books and book entries which are made a little later, it seems desirable to take up the method of keeping the only two books of the bank, aside from the book contain-

ing records of meetings, which have any bearing on the questions involved; that is, (1) the depositors' ledger, sometimes called the individual ledger, kept by Coleman during the entire period of his stealings, except during his infrequent vacations, and (2) the cashier's daily balance book, kept by the cashier, and frequently called the general ledger, also frequently called the cash-book, and sometimes "Earl's book." A sample page of the depositors' ledger is printed in the record directly following page 1432. This sample page, however, has no figures, and in order to make the method by which the book was kept perfectly plain, the receiver has had prepared a slip showing entries as same would have been made on three of the accounts, and this slip is affixed to page 27 of this brief.

As appears by the sample page of the deposit ledger (Record, p. 1433), the names of the depositors appear between the figures for Wednesday and Thursday of each week and between the figures of Saturday of each week and the succeeding Monday. Also that each account has a number and is kept across the page instead of up and down. Also that the pages are so ruled that this is practicable and easy. Each page of the depositors' ledger begins with a column headed "Aggregate." This column was used only for occasional computations of interest on accounts which were allowed interest, and, so far as this case is concerned, may be disregarded. Then follows a column headed "Tuesday's balance," and in that column was entered every Tuesday at the close of business the amounts standing to the credit of the various depositors whose names appear on

the page. Then follow the rulings for Wednesday, Thursday, Friday, Saturday, Monday, and Tuesday, except the final entries for Tuesday which were carried forward onto the page for the next week. The rulings for each day comprised four columns, the first for "Checks in Detail," the second for "Total Checks," the third for "Deposits," and the fourth for the balance at the end of the day.

When the record speaks of a day when balances were "extended," it means a day when each depositor's balance at the close of business on that day was put down in the balance column for that day. This was done sometimes twice a week, sometimes three times a week. On the other days, when balances were not extended and when the account of an individual depositor did not change, no entries were made in the "Checks in Detail" column, the "Total Check" column, the "Deposits" column, or the "Balance" column. But when, on a day when all the balances were not extended, an individual account did change, the changes were noted and the proper balance for such individual depositor put in the balance column for that particular day. If, however, no entries appear in any of the four columns opposite the name of an individual depositor on a day when balances were not extended, this means simply that there were no transactions and that the balance to the credit of such individual depositor at the end of such day was the same balance which he had to his credit on the previous day, as shown by the balance column of such previous day.

Checks paid and charged to a depositor were entered in black ink if paid over the counter or to

one of the nearby banks in Cambridge, in red ink if paid through the Clearing House or the First National Bank of Boston or the National Shawmut Bank of Boston.

This is made somewhat clearer if an examination is made of the slip affixed to page 27 of this brief (*q.v.*).

Examining the same, if we take the second account, that of Leal A. Headley, we find Mr. Headley had to his credit at the close of business on Tuesday $145.10. All balances were extended at the close of business on every Tuesday. On Wednesday none of his checks came in for payment and he made no deposits. All four columns for Wednesday are, so far as he is concerned, blank, and that means that at the end of business on Wednesday (balances generally not being extended on Wednesday) the amount to his credit was $145.10, and the same is true on Thursday. The only difference is that on Thursday all balances were extended, and therefore the figures appear in the balance column on Thursday, $145.10.

Taking the next account, we find the depositor W. H. Hersey had to his credit at the close of business on Tuesday $292.50. On Wednesday two of his checks came in and were paid, one of $75 (which, being in black ink, shows it was paid over the counter) and one of $25 (which, being in red ink, shows it came in through the Clearing House, the First National Bank of Boston, or the National Shawmut Bank of Boston). The total of these two checks paid and charged to his account on Wednesday is $100, and the figures "$100" appear in the "Total

Checks'' column for Wednesday. On this same Wednesday Mr. Hersey made a deposit of $150, which appears in the ''Deposits'' column, and the final result is that his balance on that day increased $50 and appears in the balance column at the end of Wednesday's business as $342.50. It will be noticed that, although balances generally were not extended on Wednesdays, this particular balance, being different from the balance at the close of business on Tuesday, was put down.

Following this account into Thursday, we find one of Mr. Hersey's checks for $10 came in and was paid. It is entered in black ink, which shows it was paid over the counter. As there was but one check, the same figures, ''$10,'' appear in the ''Total Checks'' column. Then in the ''Deposits'' column for Thursday appears a deposit of $20 and, all balances being extended on Thursday, Mr. Hersey's balance is extended with the rest, and appears at the end of Thursday as $352.50.

In the same way the account of W. Heffner shows a balance at the end of business on Tuesday of $196.20. No entries on Wednesday, which indicates that no checks came in to be charged. No deposits were made, and the balance stands unchanged at the end of business on Wednesday. On Thursday appear in red ink the figures $50 in the ''Checks in Detail'' column, showing that a check for Mr. Heffner for $50 came in for payment through the Clearing House or through the First National Bank of Boston or through the National Shawmut Bank of Boston. As this is the only check, the same figures of $50 appear in the ''Total Checks'' column, the ''De-

posits" column is blank, indicating no deposits on that day, and, all balances being extended on Thursday, Mr. Heffner's balance is carried forward at the end of that day and shown as $146.20.

On the few occasions when a depositor overdrew, the debit balance was supposed to be put down in red ink to distinguish from the credit balances, which were always in black ink.

To ascertain the condition of the bank as a whole as regards its deposits on a day when all depositors' balances were not extended, all that was necessary to do was on each page to take the total of the balance column on the previous day (when depositors' balances were extended), deduct therefrom the total of the "Total Checks" column on the day in question, add thereto the total of the "Total Deposits" column on the same day, and the result would be the total of the deposits of the forty-five depositors on that particular page of the ledger at the close of business on that day. This amount could be, and should have been, written at the foot of the balance column, although it would not be the sum of the comparatively few figures in the balance column on this particular day. The totals of the "Total Checks," "Total Deposits," and "Balance" columns should have been put down on each business day.

Spaces were provided at the foot of the columns for these additions. See the sample page of the depositors' ledger (p. 1433).

When the figures were made up in this way to show the total of the bank's business at the close of business on a day when the depositors' balances were not extended, it was called "extending the totals."

And see the second sheet of the exhibit following page 1432, which is marked page "1435," where are shown the rulings made upon the last page of the depositors' ledger, which rulings provide for carrying out all the totals on all the pages and ascertaining complete results of each day's business.

A specimen page of the only other book (aside from the book containing records of meetings) the keeping of which is important in connection with the questions involved in this case is found in the printed record between pages 1406 and 1407, and is marked "1407A." See also record page 301A. Quite a number of the entries on this book have no importance so far as this case is concerned, but it is necessary to understand how it was kept. Except on a very few occasions, when the cashier was ill or away from the bank, this book was kept wholly by him, and in his own handwriting. The amount of each check that was paid over the counter was entered by him in the first column from the check itself, before or after the check had been to Coleman to be charged against the drawer. The amount of each deposit was entered by him in the second column and from the deposit slip, before or after the same had been through Coleman's hands for him to give the depositor making the deposit the proper credit. But the total of the Clearing House checks (which usually considerably exceeded in amount the sum of the checks paid over the counter) was entered in the first column by the cashier in a lump sum, with the letters C.H., and the amount which he entered with the letters C.H. usually also included the amounts paid or credited the National Shawmut

	Aggregate	Tuesday's Balance	WEDNESDAY			
			Cks. in Detail	Total Checks	Deposits	Balance
1						
2		145.10				
3		292.50	75. 25.	100.	150.	342.50
4		196.20				
5						

		THURSDAY			
		Cks. in Detail	Total Checks	Deposits	Balance
Hayes, Margaret	1				
Headley, Leal A.	2				145.10
Hersey, W. H.	3	10.	10.	20.	352.50
Heffner, W.	4	50.	50.		146.20
	5				

Bank and the First National Bank, as well as the Clearing House items proper.

Among other purposes this book was intended to be a check on the bookkeeper's deposit ledger. The cashier on any day by taking from his book the figures showing the total deposits of the bank at the close of business on the previous business day and adding on the day in question, when the business of the day was over, the day's total of all deposits made, and deducting the day's total of all checks paid, would get the total amount of the bank's deposits at the end of that day. Then, if he had personally examined the totals of the "deposit ledger" for that day, and ascertained the total amount of the bank's deposits from that ledger, and compared the figures with his own total, the two must correspond, or there would necessarily be an error somewhere in the figures of either the bookkeeper or himself. This he never did in any proper or effective way, as is shown by the fact that he never discovered any of Coleman's false additions, or any of the hundreds of important discrepancies between the "Total Deposits" of the depositors' ledger and his own cash-book, some of which began to appear as early as January, 1907, more than three years before the bank closed. (Defendants probably will not admit the statements in the last two sentences, and the matter is taken up more fully hereafter.)

On January 31, 1907, a *correct* addition of all the balance columns on the "deposit ledger" exceeded the total deposits as shown on the cashier's book by $1005.18 (Record, pp. 1084-1085). This error, of course, could not have been discovered by the cashier unless he had himself added all totals of the balance

columns in the deposit ledger. *But as early as June 25, 1907, Coleman's own figures on the deposit ledger of the total owed the depositors by the bank varied $18,000 from the figures on the cashier's own book, and from this time large variations appeared almost constantly during the remainder of the two years and eight months that the bank continued in existence (see Tables of the Expert, Mr. Fraser, Record, pp. 1094-1126, inclusive). At times the differences were over $100,000, and correct additions of Coleman's balance columns on quite a number of occasions toward the end of the bank's career would have revealed differences of over $200,000.*

It is true on many of the last-named occasions that to make the comparison the cashier would have had to add the totals of Coleman's twelve or fourteen balance columns, Coleman neglecting to put down any additions.

The fact that after July 13, 1908 (Record, p. 1114), Coleman ceased to bring the totals forward was of itself significant and suspicious.

But many early dates, *e.g.*, March 21, 1907, March 25, 1907, March 26, 1907, March 28, 1907, April 1, 1907, April 2, 1907, show false additions of columns; and later, *e.g.*, June 30, 1908, July 2, 1908, July 7, 1908, these increase both in number and amount, and by February 1, 1909, half of the balance columns frequently have false additions, and by July 6, 1909, sometimes thirteen of the fourteen balance columns have false additions, the discrepancies often running to very high figures (see Master's Special Findings of Fact, Record, pp. 1455-1641).

The depositors' ledger as ruled required the book-

keeper having it in charge (Coleman) to make up the totals daily and to make the entries on the last page that each day was supposed to show the grand totals. That for most of the time, including all of 1907, half of 1908, and all of 1909, and until the bank closed in February, 1910, he did not do this at all can be attributed to carelessness of the cashier, Coleman's immediate superior, to neglect of the cashier to supervise the work on the deposit ledger, and to his knowledge that no other inspection of his ledger was to be apprehended.

The testimony regarding the comparisons between the two books made by Earl and Coleman is to some extent conflicting. The references to the same are given hereafter. It would take too long to incorporate all of it in this brief, but it is submitted that the conclusion of the Court as same is set forth in Judge BINGHAM's opinion in the District Court (Record, p. 210)—

> **"After he, Earl, had been cashier for about three or four years, he seems to have become very lax, and to have exercised little supervision over the work entrusted to his subordinates. Possessed of his knowledge and intelligence, it would seem that if he had exercised the slightest care in supervising Coleman in the handling of the Clearing House checks and in the keeping of the depositors' ledger, the greater portion of the defalcation never would have taken place"—**

is fully justified on the evidence, and also that the conclusion of the District Court (Record, pp. 187, bottom, and 188) is also justified. Plaintiff quotes:

"During this year [1907] his defalcations were concealed by dropping the balance due Edwin Dresser anywhere from $17,000 to $20,000; by making false additions of the 'Balance' columns, and by failing to transfer to page 14 of the folio the balance footings and add the same, which, if it had been done, would have disclosed that his balance footings for days and weeks exceeded the deposits on the cashier's ledger by many thousand dollars; and this was so notwithstanding he had made the additions of some of the 'Balance' columns less than the true additions."

"The master has found that at the end of every day the cashier's figures and Coleman's agreed. What Coleman gave Earl as the balance due depositors on any given day may have compared with the sum due them as it appeared on Earl's ledger. Coleman had access to Earl's ledger and could easily learn from it the sum necessary to make the comparison when called on by Earl. This would be much easier than totaling the footings of his 'Deposits' and 'Total Checks' columns for the fourteen pages for the day and adding them together to get the totals of the respective columns and striking the balance, and it was sure to compare with Earl's figures, while a computation made from his books ordinarily would not. The agreement, therefore, between Earl's and Coleman's figures must, as a rule, have been due to Coleman's knowledge of what Earl's book showed."

In examining the tabulations above referred to it should be kept in mind that these tabulations, made

by the expert, Fraser (with possibly some exceptions), cover only days when depositors' balances were all extended. But the same, or substantially the same, discrepancies existed on all days after they began to appear, for the great bulk of the time during more than two and one half years prior to the closing of the bank; that is, on the days when totals only were extended, in the manner above explained. For example, on the record, page 1118, we find figures of discrepancies of eleven days in July, 1909. In that month there were twenty-six business days, and on the other fifteen days discrepancies substantially the same as those in the tables existed. It was a steady thing; not a case where the discrepancies existed on days when all balances were extended and did not exist on days when totals only were extended.

Coleman's stealings month by month and the totals were ascertained by the expert, Mr. Fraser, as a result of careful investigation of the books of the bank, and were testified to by him in detail. The special master adopted his figures and testimony as correct in every respect, although the special master, when he attempted to put down the amounts month by month in his report (Record, pp. 81, 82), made some mistakes. For example, stating the stealings in January, 1908, to have been $600, whereas they were but $300; and carrying forward a total of $33,000, whereas it should have been $32,400. Also putting down the stealings for August, 1908, as $5800, when the true amount was $6100, and the total stealings up to the end of August, 1908, as $45,560, whereas

the true amount was $45,860. The following figures are correct and undisputed:

Coleman's total stealings from November 24, 1906, to February 21, 1910, amounted to $310,143.02. Month by month these stealings mounted up as follows:

	Stealings per month.	Total shortage at end of month.
1906.		
Nov. and Dec.	$1,005.00	$1,005.00
1907.		
January	nothing	1,005.00
February	1,835.00	2,840.00
March	9,025.00	11,865.00
April	5,235.00	17,100.00
May	nothing	17,100.00
June	1,000.00	18,100.00
July	nothing	18,100.00
August	3,000.00	21,100.00
September	7,000.00	28,100.00
October	2,000.00	30,100.00
November	1,000.00	31,100.00
December	1,000.00	32,100.00
1908.		
January	300.00	32,400.00
February	nothing	32,400.00
March	400.00	32,800.00
April	2,375.00	35,175.00
May	2,435.00	37,610.00
June	1,400.00	39,010.00
July	750.00	39,760.00
August	6,100.00	45,860.00
September, restored	40.00	45,820.00
October	235.00	46,055.00

November	nothing	$46,055.00
December	$3,616.00	49,671.00
1909.		
January	6,829.26	56,500.26
February	1,246.95	57,747.21
March	10,833.73	68,580.94
April	1,400.00	69,980.94
May	13,410.00	83,390.94
June	5,152.06	88,543.00
July	18,050.00	106,593.00
August	6,250.00	112,843.00
September	17,350.00	130,193.00
October	47,277.08	177,470.08
November	51,847.00	229,317.08
December	46,956.44	276,273.52
1910.		
January	27,395.53	303,669.05
February	6,473.97	310,143.02

VARIOUS MATTERS OF FACT TAKEN UP IN DETAIL.

The foregoing history of the bank covers the situation in outline for the period when the stealing was in progress and for some years prior thereto. This brief will now discuss in some detail, with references to the evidence, various matters throwing light on the situation in the bank, the action or non-action of the defendants, the warnings received from time to time by the defendants regarding Coleman, the state of the books from time to time as affording opportunities to the defendants to detect the fact that there was a thief in the bank, and similar matters. Plaintiff will endeavor, where matters are at all in dispute, to call attention to that

fact, so that the Court may bear in mind the principal controversies between the parties relative to the facts.

THE SEVERAL WITNESSES AND THEIR RELIABILITY.

The plaintiff called as witnesses:

H. Douglass Campbell,
George E. Carter,
Roswell Wetherbee,
Wellington Fillmore,
Willard A. Bullard,
Thomas P. Rowe,
Herbert E. Lombard,
George W. Coleman,
Richard W. Wright,
Thomas W. Brady,
Jere Arthur Downs,
Walter G. Davis,
Frank Van Blarcom,
William E. Burrage,
Charles G. Bancroft,
Wilson W. Lockhart,
Albert B. Roaf,
Charles L. Bragg,
Louis W. Cutting,
Albert E. Fraser (the expert),
Frank L. Earl,
Edward A. Paul, taken by deposition.

No question has ever been raised by counsel for defendants as to the entire reliability of the witnesses Campbell, Carter, Wetherbee, Fillmore, Bul-

lard, Rowe, Lombard, Wright, Downs, Davis, Burrage, Bancroft, Roaf, Bragg, Cutting, Paul, and Fraser. The master and the District Court have both treated their testimony as wholly reliable, and apparently the Circuit Court of Appeals takes the same view.

The testimony of the witness Brady was unimportant. So far as plaintiff knows, no question was raised regarding his truthfulness.

Plaintiff believes the witness Lockhart, whose testimony was quite important, was entirely truthful, although his testimony might possibly have been questioned from the fact that he was the messenger through whose agency Coleman cashed most of his fraudulent checks. Lockhart testified, however, that he had neither knowledge nor suspicion of anything fraudulent in connection with such checks, and Mr. Morse, counsel for three of the five defendants, stated, at the arguments before Judge Bingham in the District Court (Record, p. 1363):

> "There was no suggestion that the witness Lockhart was a party in any fraud in the case, that he was a man of good standing, holding a respectable and responsible position, a young man, but old enough to tell the truth, all of which indicated he was a man whose character and veracity are to be highly considered. That there was nothing whatever about Lockhart to indicate he was not honest and truthful."

Counsel for defendants Barber and Richardson made neither admissions nor claims one way or the other regarding Lockhart's truthfulness.

The plaintiff offered the testimony of Van Blar-

com (which is of little importance, because it is chiefly regarding amounts and dates of various shortages about which there is now no dispute), and believes his testimony reliable. What position defendants take regarding him, plaintiff does not know.

The witness Earl, the cashier of the failed bank, was offered as a witness by the plaintiff, and testified at great length. His testimony reveals no bias whatever. No claim is made that he had any knowledge of any of Coleman's irregularities or was in the remotest degree a party thereto. It is admitted that he was absolutely honest, and the receiver's counsel believes that counsel for the several defendants will agree with him that Mr. Earl endeavored to testify truthfully in all respects. He made, however, a number of mistakes in his testimony, and on certain points testified somewhat differently at different times. It appeared his health was poor. The mistakes in his testimony, we think it will appear, were honest mistakes, and that, except in the comparatively few matters where he erred, his testimony is reliable. On a few points where the great weight of the testimony was the other way, counsel for the receiver believes Mr. Earl's testimony should not be accepted.

The witness Coleman testified under a *habeas corpus ad testificandum*. In view of the fact that his thefts wrecked the bank, his testimony, uncorroborated, would not, perhaps, stand high. Counsel for the receiver believes that he testified untruthfully on three or four points only. *But the plaintiff's case depended in no respect whatever on Coleman's uncorroborated testimony, and nine tenths, if not ninety-nine one*

hundredths, of his testimony was corroborated by the entries on the book, by the exhibits, by the testimony of reliable witnesses, by admissions of several defendants, or in other and sufficient ways. He testified wrongly at times regarding figures and the situation in the bank during the time of his thefts. In most cases he corrected himself when shown that his testimony was erroneous. And aside from the few exceptions above referred to, where his testimony is not credible, the plaintiff believes he was a reliable witness. What grounds defendants take regarding the value of Coleman's testimony counsel for plaintiff are uncertain.

All the defendants, except Richardson, who had died, testified—Edwin Dresser, George W. Gale, Sumner Dresser, and David A. Barber—and the defendants also called as witnesses the two bank examiners who examined the bank twice a year during the period of Coleman's thefts, Harry F. Currier and Ellis S. Pepper; also Charles G. Bancroft, Josiah H. Goddard, John D. Hardy, and Dr. E. E. Bancroft.

The plaintiff concedes that Messrs. Currier, Bancroft, Goddard, Hardy, Pepper, and Dr. E. E. Bancroft testified truthfully, and that David A. Barber, defendant, testified truthfully as to facts, but without admitting his conclusions. Plaintiff submits, however, that the testimony of Edwin Dresser and George W. Gale was not wholly reliable, and that the testimony of Sumner Dresser was extremely unreliable, and that this was shown by the cross-examinations (Record, p. 1316).

Negligence of Earl, the Cashier.

The question of fact whether Earl was or was not a competent cashier is important. If he was competent, still the directors should have exercised a reasonable supervision over him and his work. An important part of his work was to see that the books of the bank were properly kept. The master finds there does not appear to be anything to show that Mr. Earl was incompetent, and that his work as an accountant showed no lack of skill or ability; that "he was accurate in his own . . . bookkeeping" (Record, p. 93). The District Court finds differently from the master as regards Earl's diligence (Record, p. 210).

Counsel will not attempt to discuss all the matters in which Mr. Earl was incompetent, but, as a preliminary, it hardly needs any argument that he might have been a fairly good teller, or a fairly good bookkeeper, or might have kept the records under the efficient supervision of Mr. Davis, whom he succeeded as cashier, in a fairly competent way, and still not have been qualified to fill the position of cashier, an executive office, involving discretion, judgment, the supervision of subordinates, and a certain amount of keenness, which most assuredly Earl did not possess, as his experience in the Lynn bank, before he came to Cambridge, as well as what happened in Cambridge, showed.

But a few instances of Earl's utter incompetency as cashier may be stated:

(1) He let Coleman, the young bookkeeper in the bank, steal $310,143.02, doing it directly under his, Earl's, nose, *and during a period of about three years and four months.*

(2) He permitted Coleman to keep his deposit ledger, with many hundreds of false entries, fraudulent and otherwise, including hundreds of false additions, dropped balances, raised balances, and other false entries, never detecting a single one of them. He permitted him at times not to foot his columns at all, and for very long periods not to make up his totals at the end of each day's business. In fact, in all of Coleman's bookkeeping work, he exercised over him no supervision worth the name.

(3) During the three years and three months that Coleman was bleeding the bank to death, Earl, though Coleman's immediate superior in the bank, *not only did not detect the cause of the trouble, but never even guessed that there was any trouble at all.*

(4) He advised, or concurred in, having Coleman in October, 1905, when less than twenty years of age, made the teller of the bank, with full opportunity to handle the cash, while he also remained the bookkeeper, able to steal at his teller's window and then go to his deposit ledger and conceal the thefts by false entries and false additions. Earl either never appreciated the extraordinary opportunities thus given Coleman, or, if he did, thought it was all right to give him such opportunities, in either case demonstrating his, Earl's, incompetency.

(5) When warned by the witness Lombard regarding certain doings of Coleman which seemed to indicate he was leading a fast life, the sole investigation which Earl made was to tell Coleman what Lombard had said, and when Coleman had said there was nothing in it, and made some excuses, he, Earl, accepted these excuses as sufficient, and made no fur-

ther inquiry or investigation (Record, pp. 306, 330, 331).

(6) When the deposits of the bank were apparently shrinking from about $417,500 (Record, p. 1126) to a figure more than $300,000 less, Earl thought the shrinkage was all legitimate, though he must quickly have ascertained, if he had ever made any inquiry or investigation, that no depositor had withdrawn his account, that no depositor had drawn down his balance, and that both the number of the depositors and the total of the deposits were increasing; also in spite of the fact that Earl was daily making the entries on his own cash book, which showed, while total deposits were apparently shrinking rapidly, that the depositors were putting in money as usual, or better than usual (see *e.g.*, Record, pp. 1315, 1316).

(7) He never made any actual attempt to see why the bank's deposits were shrinking so rapidly, but confined himself to guessing and wondering (Record, pp. 308-310, 329).

(8) He probably put the bank examiner Pepper off the track at the time of his last examination, by volunteering the statement to Pepper that, though there seemed to be a heavy shrinkage in deposits, they suspected that was due to the competition of nearby trust companies, etc., when, as a matter of fact, as above stated, the bank had not lost any deposits to any bank or trust company (Record, pp. 335, 348).

(9) He was apparently unable to keep proper records of the directors' meetings, as required by the by-laws.

(10) He never located any trouble which arose in

the bank in connection with the apparent shortages of Roaf, Bragg, and Cutting, nor, so far as the evidence showed, any difficulty that ever occurred in the bank.

(11) He saw the bank's young bookkeeper and teller buy a high-powered, five-passenger automobile, and run the same for about two years, without taking any steps to investigate where he got the money, beyond possibly making a few inquiries of the young man himself (Record, pp. 307, 331, 332).

(12) He did not make comparisons (when he made them at all) between his book and Coleman's deposit ledger in such a way as to make his book serve as a check on Coleman's work, but at all times left his book accessible to Coleman, so that, instead of being a check, it served as an actual assistance to Coleman in doing his stealing.

The references to this subject in the evidence are numerous (see Record, pp. 188, 340, 579, 580, 582, 584, 585, 586, 656, 657, 694, 745, 746, 747, 766, 768, 839, 840).

(13) He was apparently never aware of the fact that in many cases Coleman did not foot certain columns at all (Record, p. 307—see the Opinion of the District Court, p. 190). Also he never verified the additions on the deposit ledger (Record, pp. 307, 317).

(14) He permitted Coleman, when he wanted to take a vacation, to select to take his place Lockhart, who was for a considerable time in Coleman's own personal employ, which fact also Earl did not know (Record, pp. 311, 312, 321, 331, 863).

Of course the fact that Earl was negligent is of

itself not sufficient to make the defendants liable for the consequences of his negligence, but it is a fact to be considered in connection with the other evidence in the case, especially as he was negligent in so many matters and so utterly incompetent in all except a few routine duties that all the defendants, and particularly the president, could hardly help knowing it.

And although this comes more properly later in the brief, when the master's report is taken up in some detail and criticized, it is significant that the master, *after excluding certain pieces of evidence tending to show Earl's negligence on the ground that the plaintiff was unable to offer testimony bringing these matters to the knowledge of the defendants, then goes ahead and finds as a fact that Earl was not negligent in any respect*, and he does *not* mention that he has excluded direct evidence to that effect, on the ground just stated (Record, p. 1362).

Coleman's Various False Entries on the Deposit Ledger.

Of course, when Coleman stole $1000 the bank's assets were diminished by that sum, and the bank's liabilities to its depositors were *not* diminished as would have been the case had the $1000 been paid on a depositor's legitimate check. It was necessary in order to make the two sides of the daily statement balance that the real liabilities should appear diminished on the deposit ledger so as to match the depleted assets. How was this done? Coleman adopted several different methods, the principal ones being as follows:

1. By wrongfully charging the amount of a particular theft to the balance of some substantial depositor. This method of concealment was tolerably safe as regards immediate detection, for the additions on his deposit ledger could be correctly made and his "Total due Depositors" at the end of the day's business would correspond with Earl's, *i.e.*, the deposit ledger alone would not reveal the fraud.

Detection would have followed, however, if the cashier had inspected the checks which came in through the Clearing House, as he daily inspected all the other checks paid by the bank.

There was also the danger that the particular depositor might seek to draw out more than his fraudulently diminished balance or ask to have a check certified for more than such balance. In either of these cases, had Coleman been out of the bank, trouble might have arisen, but the danger of detection was minimized from the fact that while he was in the bank he was usually asked by the teller if question arose as to payment of a check, or by the cashier if question arose as to the certification of a check, and, knowing the true balance upon the account inquired about, he could state to teller or cashier that everything was all right. And during the twenty-five months when he was both teller and bookkeeper (his thefts began while this was the situation) this particular risk did not exist.

In the absence of any careful examination of his deposit ledger, and until his shortage became $15,000 or $20,000, this was the safest method. It required Coleman, however, to take considerable pains at the end of a month when pass-books were balanced to see that

each depositor was given his proper credit. Still, there being at this early stage only a few accounts tampered with, and with his private memoranda in many cases as to the shortages on these particular accounts, and being himself at his ledger to call off to the teller or cashier making the entries on the pass-books, there was not much risk. But of course at all times an audit of the bank would have revealed a shortage.

2. He also, in a great many instances, when a fraudulent check came in for payment, increased the true addition of the "Total Checks" column on some particular page by the amount of that particular steal.

Then, when this false (increased) total was deducted from the total of the balances of the previous day, it carried into the total balances of the day in question the amount of the theft, and left no depositor's individual balance short; but it also left one false (increased) addition on the deposit ledger, that of the "Total Checks" column, and if it was a day on which all balances were not extended, this was the only false addition; if it was on a day when all balances were extended, there would be also a false (diminished) addition of the total "Balance" column. In extending totals with no one ever verifying the "Total Checks," "Deposits," and "Balance" columns this method of concealment seems to have worked well, though any verifying of the totals of the columns would have resulted in prompt detection.

3. In a great many other instances instead of increasing, fraudulently, the "Total Checks" column of a particular page, he merely put a false (di-

minished) total at the foot of the total "Balance" column of that particular page, the difference being the amount of the fraudulent check coming in that day for payment. In this case no depositor's account appeared short. The "Total Checks" column added correctly, but the total "Balance" column added incorrectly, *i.e.*, the fraudulent addition being less than the true addition. In such cases an extension of the totals, without verifying additions of columns, would also have revealed trouble.

4. In occasional instances when a fraudulent check came in for payment he gave his own account, or the other accounts to which he gave fraudulent credits to enable such accounts to honor their checks (Kissel Kar Company and W. L. Hayden), false credits. This was difficult to detect from the deposit ledger alone, but could have been easily detected had any one added the total deposits on the day in question as same appear on the deposit ledger and compared the total with the total of the same items on Earl's book. It could also have been detected by adding and comparing the totals due the depositors of the bank upon the two books. This, however, was more complicated, while the first method was very simple.

5. There were other occasions when Coleman charged in the "Total Checks" column an amount to some particular depositor with no corresponding entry or entries in the "Checks in Detail" column. In such cases he rarely if ever deducted the amount from the depositor's balance. An entry in the "Total Checks" column not supported by an entry or entries in the "Checks in Detail" column was obviously either a fraud or a mistake, and could have been detected as in-

dicated above. Also, on some occasions where deposits were made, Coleman did not enter the deposits to the credit of the depositor making the same. A notable instance of this was one occasion, November 29, 1909, when Edwin Dresser deposited $10,000 to his own credit and Coleman did not put the deposit on the deposit ledger.

These were the ordinary ways of concealment adopted when checks came in for payment; and as his stealings increased in number and amount these fraudulent entries also increased in number and amount, so that at the same time his deposit ledger very frequently—indeed, after January 1, 1908, a large part of the time—showed false charges to particular accounts, false entries on "Total Checks" columns, false additions of "Total Checks" columns, and false additions of "Balance" columns, all at the same time, often columns not footed, and at times checks fraudulently charged to depositors' accounts and fictitious deposits as well.

When shortages had got into the deposit ledger and been concealed by one or more of the above methods there followed many hundreds of what are called concealment entries, *i.e.*, entries designed to shift and cover up, as he thought this could best be done to keep his thefts from discovery. For example, especially in the early part of his stealings, this would frequently be done by concealing his shortage by false charges to individual depositors until near the end of the month; then, in order to avoid difficulties at the time of balancing the pass-books, he would jump balances from one day to another in

order that on the last day of the month the depositor might have the correct credit. In jumping a balance Coleman simply took a depositor's balance appearing at the close of business, we will say at $500, and carried it forward the next day, without a deposit to account for the increase, at a larger sum. For example, if that particular account was $500 short, he would, when it appeared desirable, jump it to $1000, the correct figure. A comparison of such an account for the two days in question would have showed the unauthorized increase. This happened in a very large number of cases. This, however, caused large discrepancies in the additions of his total balance columns on the days when the depositors were all given their proper credits. Then, after the pass-books had been balanced, perhaps on the second or third of the next month, he would drop individual balances as he had previously jumped them, *i.e.*, a depositor's balance of $1000 on Monday would, without any charges appearing on the ledger, drop to $500 on Tuesday, and with a sufficient number of balances dropped he could again make his additions of his balance columns correct, *i.e.*, the additions would be the correct additions of the fraudulently diminished items in the columns. The balancing of the pass-books at the end of each month would have involved considerable danger of detection had not Coleman been permitted to "call off" the balances from his ledger to those assisting in the work (Record, pp. 326, 327).

Various other false entries were made from time to time, but the classes above enumerated comprise

not less than nineteen twentieths of the total false entries.

Quite frequently there appeared on the deposit ledger erasures, some made with acid, others with a "scratcher," also memoranda in Coleman's writing throwing light on his fraudulent entries; for example, a double cross against a fraudulent entry, figures indicating the precise amount fraudulently added to or deducted from the total of a column, the initials of a depositor whose account had been manipulated and should be restored, etc., all of which would have been significant if any one had examined the books with any care (Record, pp. 367, 372, 384, 395, 509, 511, 514, 553, 554, 612, 616, 622, 671, 754, 755, 759, 760, 787, 788, 789, 790, 811, 826, 829).

SUMMARY OF CONDITIONS REGARDING FRAUDULENT ENTRIES.

1. *The deposit ledger was never correct from the time of the first thefts in the present shortage, November 24, 1906, to the close of the bank, February 21, 1910.*

2. At times, when the entire shortage was charged in to individual accounts, that is, when depositors' legitimate balances were diminished by an amount corresponding with the shortage, the additions of the columns were correct, and the total amount due depositors as per the deposit ledger corresponded with the same figure on the cashier's ledger, but this, while a common situation in 1906-1907, was a very uncommon situation during the latter part of the thefts, *i.e.*, in 1908 and 1909 (Fraser's Testimony, pp. 1094-1126).

3. *The discrepancies between the total due depositors on the cashier's ledger and the total deposits as per Coleman's ledger began at an early date, and continued, frequently reaching very large figures, down to the time the bank closed. Any discrepancy whatever indicated fraud and dishonesty, and none of the discrepancies were ever noticed by anybody, although the system by which the two books were kept was such that comparisons might have been quickly and easily made at any time.*

4. Failures to carry totals to the last page of the deposit ledger, failures to add columns, mistakes, erasures, memoranda, and similar irregularities of a suspicious nature were very common upon the deposit ledger, especially during the last two years of the bank's life.

5. There never was a time after November 24, 1906, when an audit of the bank would not have disclosed the shortage, and there was seldom a time after the spring of 1908, except when Coleman had doctored the books for the bank examiner, when five minutes' inspection of the deposit ledger alone would not have disclosed a considerable shortage, though it would not have enabled the person looking at the book to determine the exact amount of the shortage.

6. There was seldom a time during the same period when a comparison of the total due depositors on Coleman's ledger and on the cashier's book would not have disclosed that something was wrong.

7. *It is interesting to note that Coleman very frequently manipulated the accounts of all the defendants who had accounts in the bank, and the accounts of the various corporations and concerns with which*

they were connected. See the testimony regarding the fraudulent entries on the accounts of Edwin Dresser, The Standard Diary Company, George W. Gale, The George W. Gale Lumber Company, George W. Gale, Agent, Gale & Stone, David A. Barber, and the Standard Action Company.

8. There is frequently testimony about accounts of deposits being "restored," or amounts "restored" to the depositors' accounts. These were not real restorations of money at all. Simply the figures on the deposit ledger were increased to the correct figures, where the amounts had previously fraudulently been dropped.

EXAMINATIONS BY THE BANK EXAMINERS.

The testimony showed that the bank was examined twice a year by the national bank examiners. The two who made the examinations during the period of the thefts were Messrs. Currier and Pepper, who alternated. Earl, Coleman, the bank examiners themselves, and other witnesses were examined as to just what was done during these examinations, and there is no real controversy regarding the matter. While no notice was ever sent to the bank that an examination was to take place, the examinations always took place around June 1 and December 1; sometimes within a few days prior to June 1 or December 1, sometimes within a few days after June 1 or December 1. The time spent by an examiner varied, but averaged about five or six hours, rarely extending beyond six hours (see Record, pp. 311, 210, 1239). The examiner always counted the cash, examined the bills and notes receivable,

checked up the collateral, made inquiry regarding the names on the bank's paper, also regarding overdue paper, and similar matters. He checked the stock-book and looked over the minutes of the directors' meetings, examined and to some extent verified the accounts of the bank with correspondent banks, and, near the close of his examination, came over to Coleman's desk, looked at the depositors' ledger, and verified the same by adding the columns *for one day*—usually, if not always, for the preceding business day (Record, pp. 1195, 1232). Then he compared the total due depositors by Coleman's figures for that particular day with the same item on Earl's book. He may possibly, at times, have done a little more work on Coleman's ledger, but the evidence to that effect is very shadowy. The time spent by the examiner on his examination of one day's entries in the deposit ledger was, according to the testimony, not much over an hour (Record, p. 1211), and in that time he was obliged to add twelve or fourteen long balance columns and make up a total, and also required, if he did his work carefully, to add a like number of "Total Checks" columns, and a like number of "Deposits" columns, and to compare his totals with the totals on the general ledger. The depositors' ledger and the cashier's book were planned and ruled in such a manner that they were a daily check upon each other as regards the total due depositors, *if properly used*. The examiner no doubt felt there was no necessity for his going further back.

In 1908, for a little less than two months (April 21 to June 18), Coleman had his stealings charged to individual accounts, and so far as his additions

of balance columns were concerned his books were apparently correct. But except for this particular period, this condition did not generally obtain during the time for which the District Court has held all defendants liable, and the Circuit Court of Appeals has held Edwin Dresser's estate liable. Coleman knew about when the bank examiner would call, and, from one to two weeks prior to the time when he was expected (about June 1 and December 1 of each year), fraudulently charged into individual depositors' balances sums to make the total so charged equal the total of his shortage. By doing this he was able to make his additions of his columns correct on the critical day, as well as for a week or ten days or two weeks before the examiner came, and was able to make for these days the total due depositors on his book correspond with the same item on the cashier's book. But this condition of the deposit ledger obtained only for very short periods, with the exception of the eight-weeks' period just referred to.

Soon after the examiner left Coleman would jump balances and falsify additions again. In this way the examiners, being also misled on at least one occasion by Earl's telling them that he suspected the shrinkage in deposits was due to nearby competition, and not knowing of Coleman's outside activities, and not having the special warnings regarding him which some of the defendants had, and not knowing that small balances to the credit of some of the rich depositors of the bank looked suspicious, did not suspect Coleman or catch him. The last examination before the failure, made December 3, 1909, less than three months before the bank closed, came at a time when

the bank was in desperate condition, and Coleman had practically given up hope of escaping detection. On this occasion, however, while the bank examiner was in the bank and doing his other work, he, Coleman, decided he would try once more, and did so, slashed depositors' balances on his deposit ledger with the utmost freedom, managed thereby to get his additions correct, though for one day only, and again succeeded in hoodwinking the examiner.

During this period of about eight weeks in the spring of 1908, and for short periods prior to each examination by the bank examiner, the additions of the columns on the deposit ledger, averaging not over two weeks, were correct and the totals corresponded with the total due depositors on the cashier's book. This condition from June 18, 1908, to the close of the bank, in February, 1910, prevailed on less than one twelfth of the business days of that period, and during such limited times, without communicating with the depositors or running back more than a week or, possibly, ten days, any one examining the ledger would not readily have detected the shortage. *But any director or person having any familiarity with the accounts must, if he had examined the deposit ledger at one of these exceptional times when the additions were correct, have noticed the unusual fact that large depositors of the bank (whose true balances on said ledger had been cut down by Coleman to small amounts) were carrying low balances, and any inquiry made of any one of the depositors whose accounts had been so manipulated would have disclosed Coleman's wrong-doing.*

Neither the president nor any director ever did

make any investigation of the depositors' ledger at one of these periods or at any other time, to ascertain facts regarding the apparent rapid shrinkage that was going on (see *e.g.*, Record, p. 310). And the indisputable fact remains that the above condition of the deposit ledger, namely, when it was somewhat difficult to find anything wrong on the deposit ledger even when compared with the cashier's book, covered only a small portion of the time during the last two years or thereabouts of the bank's existence.

The special master puts it as follows (Record, p. 83):

> **"Examination of his books at such periods, thus manipulated and prepared, carried to the extent of adding every credit column, every debit column, and striking the balances, would have shown a correspondence with the cashier's balances and could not have been successful in disclosing his frauds without either examination of all the deposit slips, or calling in the books of the depositors for the purpose of obtaining their figures in regard to deposits and withdrawals."**

This is quite true, but the special master does *not* say that these occasions in the last two years of the bank's life were chiefly when Coleman was preparing for the bank examiner, and that for the great bulk of the time the quoted sentence is absolutely false as regards the condition of the deposit ledger.

In one respect, and, so far as the plaintiff knows, in only one respect, is the condition of the deposit ledgers at the present time different from what it was at the close of each business day in the bank. On

some occasions when Coleman manipulated the deposit ledger so as to deceive the bank examiner he made some supporting false entries for a few days prior to that time. To illustrate: Suppose J. C. Pillsbury, one of the large depositors, has a balance of $5000 to his credit, and it is about time for the bank examiner to appear. Coleman drops Mr. Pillsbury's balance to $1000. Assume the bank examiner actually comes on November 30. Coleman has put Mr. Pillsbury's balance down at $1000 at the close of business on November 29, the day for which the bank examiner examines the ledger entries. Now the bank examiner may look back two or three days, and therefore Coleman on November 28, 27, and 26 also puts Mr. Pillsbury's balance at $1000. By doing this he conceals $4000 of his shortage, and by doing it on numerous other accounts he conceals a much larger sum, and probably the entire shortage. He also by putting down these false (diminished) individual balances makes the additions of his balance columns on these particular days correct. Now, on December 1, the bank examiner having gone, not to reappear for another six months, and there being a possibility that some one in the bank may look at the deposit ledger to see Mr. Pillsbury's balance, and may, perhaps, be surprised at the small size thereof, Coleman jumps the balance from $1000 to the correct figure, $5000. This, of course, makes incorrect the addition of the balance column in which that balance appears. When Coleman thus jumps the balance on December 1, in order that this may not be immediately apparent to any one looking at the ledger he perhaps goes back to November 30, November 29, November

28, and November 27, and changes the figures "1000" to "$5000," an easy thing to do, which considerably diminishes the chances of an observer detecting anything wrong. But when he does this, he does *not* change the additions of the balance columns on these previous days. With the false (diminished) individual balances which had appeared on these days the additions were correct. When he has gone back and made these changes as just stated, the additions are no longer correct.

Altered entries of this character running back one, two, or more days, and made with this object, are found only on a few days prior to the bank examiner's examinations. There are not very many such entries, and certainly not enough to affect the general situation or to afford the directors any particular comfort. None of the directors ever looked at the deposit ledger, anyway, except Edwin Dresser, occasionally, and he merely glanced at it. And it is beyond dispute that, if a director had looked at the balances on any day after the stealings reached substantial figures and found individual balances apparently at about what they ought to be, he would have found the additions of the balance columns wrong. If he had found the additions correct, he would have found startlingly small balances to the credit of substantial depositors, and should therefore have been put on his inquiry as to why such depositors seemed, in so many instances, to be carrying very small balances.

Judge BINGHAM in the District Court did not have this situation in mind when he wrote the first two sentences of the paragraph beginning with the words "It would seem" on page 190 of the record. Prob-

ably the matter had not been sufficiently called to his attention. This oversight on his part (if it was an oversight) did not in the least affect the results of the case. And it is the solitary instance, so far as counsel can recall, when his report is not absolutely correct and accurate.

The defendants, to rebut the presumption of negligence on their part, relied very largely on the fact that national bank examiners made these semiannual examinations and never warned them, the defendants, of anything wrong. This contention is not sound, nor is it backed by authority. The bank examiners were not examining the bank for the directors; their examinations were for the comptroller of the currency, whose subordinates they were. The statute as it stood when this bank went into the receiver's hands is found in R.S. sec. 5240; also in Gould's National Bank Act, with Amendments (1904 ed.). Section 5240 provides that the "Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall . . . appoint suitable persons . . . to make an examination of the affairs of every banking association, who shall have full powers, etc. . . . and shall make a full and detailed report of the condition of the association to the Comptroller." Provisions are then made regarding the fee for each examination, which fee, in the case of a bank with capital of $100,000, is $25 for each examination.

Bank examiners are appointed to inform the comptroller of the currency confidentially regarding the condition of each national bank in his jurisdiction. Their reports, as appears by the evidence, were then secret (Record, pp. 334, 1190, 1194, 1195). No copies

were given to any of the officers or directors of the bank, and their knowledge of what the bank examiner found, so far as testified to, is confined to three things: First, after an examination, the comptroller frequently communicated with the bank regarding loans, overdue paper, etc., and the defendants inferred, and probably rightly, that his communications were based on information conveyed to him by the examiner. Second, they inferred that, not receiving criticisms in other matters, other matters were approved, which may or may not have been true in any individual case. And, third, there was some testimony that on one occasion, possibly more, the examiner, on finishing his work, stated in conversation that "he could give the bank a clean bill of health." There was never any *official* approval by the comptroller or by any examiner.

The question as to the legal effect as a defense of the bank examiner's not detecting Coleman's thefts is taken up later (pp. 171-176 of this brief).

A bank examination is not an audit. The Wright audit, which *was* an audit, had taken at least seven or eight days (Record, p. 846), and as Edwin Dresser, Sumner Dresser, and George W. Gale, three of the defendants, were all directors at the time of that audit and undoubtedly saw Wright's report and knew the time which his work had taken, they at least had no right to assume, as apparently all the defendants did, that the necessarily brief semiannual examination was an audit or anything like an audit.

There are cases in which examinations of corporations are really audits, and in which the directors perhaps would be absolved from liability for negligence (except for disregarding specific warnings) in so far as

such liability should be claimed to exist by reason of the condition of the books of the corporation. *In this case not one of the directors even claims that he had ever been told or given any reason to believe that the examinations made by the national bank examiner were larger in their scope than as a matter of fact they actually were.* And while they testified that they remembered little or nothing about the Wright audit, the fact was unquestioned that the audit was made while three of the five defendants were directors, was made in pursuance of a vote of the board, was undoubtedly read or communicated to the board, and went on file as one of the official records of the bank. It is also an unquestioned fact that, although the defendants testified they noticed and were somewhat worried over the rapid drop in the deposits in the fall of 1909, they did nothing at that time toward having an audit or making any real investigation, although they must have been aware that even the bank examiner would not make his semiannual examination until about December.

In the fall of 1909 the bank was going to pieces very rapidly. Coleman in October stole $47,277, and in November $51,847, and in December $46,956, and the significance of these amounts will be appreciated when the Court considers the fact that the total deposits of the bank, according to the cashier's book, the figures of which were before the directors weekly, were, on October 2, 1909, $284,854; on November 6, $240,032; and on December 4, $161,291 (Exhibit 56, Record, pp. 1429, 1430, and also p. 325).

The most startling circumstance while the bank was going to pieces as a result of Coleman's thefts alone

(there were no losses of deposits or depositors or on loans) was the almost uninterrupted and large apparent shrinkage of the deposits showing from month to month (see the weekly statements of condition submitted to the directors—Exhibit 56). Edwin Dresser testified he knew of no reason why the deposits should not "run along even" (Record, p. 1182, bottom).

The directors never personally made any investigation, although the weekly figures showed what was happening. They employed no auditor, appointed no committee to look into the matter, and even the national bank examiners were never asked to look into this matter of the shrinkage, but, on the other hand, at one examination the examiner Pepper was given to understand by the cashier, though not in express language, that the directors thought the shrinkage was legitimate (Record, pp. 335, 348).

EXAMINATIONS BY THE DIRECTORS THEMSELVES.

By-law 19 of the bank is set forth correctly on page 8 of this brief, and also in the record (p. 192). It is incorrectly set forth in the special master's report (Record, p. 65), the words "with the balances" being omitted, which entirely changes the sense of the by-law. No claim, however, is made that omission of these words by the special master was anything but an accident.

The by-law provides for semiannual examinations of the bank by a committee of directors, and prescribes in some detail what shall be done at such examinations. It was admitted that the examinations by the directors were supposed to be held in March

and September of each year, the dividends being declared semiannually at the last directors' meeting in each of those months, and paid April 1 and October 1.

There appear on the records of the bank only two references to any examination whatever during the entire time of Coleman's connection with the bank, and for a long time previous. Coleman came into the bank as messenger in the summer of 1903, and the bank closed its doors in February, 1910.

The book of records recites:

> "November 16, 1908. The Directors examined Bank this P.M. and found cash balance $28,779.71 to be correct.
>
> Attest:
>
> EDWIN DRESSER
> GEORGE W. GALE
> D. A. BARBER."

(Record, p. 70.)

Also the following:

> "MCH. 30, 1909. A special meeting of the Directors was held this P.M. at 3 o'clock for the purpose of examining the bank, the President presiding, members present; Gale, S. Dresser and Barber" (Record, p. 70).

Plaintiff contended that there were no examinations of the bank by the directors except those above referred to.

By-laws 16 and 19 (p. 8 of this brief) in effect *required* that, when an examination by the directors was made, the result should be put upon the minute-book.

Defendant Barber admitted he could recall distinctly only two examinations from the time he came into the bank in January, 1907, to the close of the bank. Defendants Gale and Sumner Dresser testified vaguely as to other examinations, but on cross-examination were compelled to admit that very likely no other examinations were made. It was admitted that no examination took place in September, 1909.

The special master found (Record, p. 94) that "other examinations were made by the Directors as a Board," meaning examinations other than those appearing on the record book. The plaintiff objected to this finding as utterly unwarranted by the evidence, and it was the most important primary fact on which he claimed the master erred. The District Court, on a review of the entire evidence, sustained the plaintiff on this point, and (Record, pp. 194-198) discussed the subject and reversed the master, and found that no examinations were made except those which the records disclosed.

For references to testimony, etc., on this question of examinations by the directors see Earl (pp. 304-305); Dresser (p. 1187); Gale (pp. 1250-1252); Sumner Dresser (pp. 1293, 1307-1309, 1329-1330).

It is more than doubtful whether the examination of November 16, 1908, included anything beyond counting the cash. *All the defendants admitted that at no examination was Coleman's deposit ledger examined or compared with anything.* Both master and Court so found. The special master even makes the scathing comment (perhaps without appreciating its significance) that if these directors *had* made an examination every six months, it would have made

no change in the situation (Record, p. 94). On the whole testimony it is clear that the most that was done at any examination was to count the cash, examine the receivables, securities, etc., and perhaps verify the stock-book and a few other items.

Nothing whatever was done by the directors at their examinations, or at any other time, to ascertain the correctness of Coleman's deposit ledger, *and as that ledger contained the figures of the chief liability of the bank, its indebtedness to its depositors, the so-called examinations, on the rare occasions when made, were utterly useless so far as determining whether the bank was solvent or whether there was any shortage on the part of the cashier or anybody else.* For if the bank owed its depositors $400,000, and had a capital and surplus of $135,000, and had total assets of $535,000, the bank was solvent, in good condition, and the book value of its stock was $135 per share. If the bank owed its depositors $400,000, and carried capital account at $100,000, and surplus account at $35,000, and had assets of only $400,000, the bank was solvent only to the extent that it could pay its debts, leaving nothing for the investment of its shareholders. And if the total assets were less than $400,000, the bank was insolvent. In other words, an examination which did not in any way investigate the liabilities of the bank and determine their correct amount was almost entirely useless.

It should be noted also that the comparison to be made, under the terms of the by-law, of assets and liabilities with the balances on the general ledger, *required* a comparison of the item "Total due Depositors" on Coleman's deposit ledger and the same item

on the general ledger, sometimes called "Earl's book." No other reading of the by-law makes any sense, and if this explicit provision had been complied with, then Coleman's heavy shortage would have been discovered years before, as clearly pointed out by Judge BINGHAM (Record, p. 195 *et seq.*).

Again, one provision of the by-law was that the examination should be made *"for the purpose of ascertaining whether or not the books are correctly kept," and nothing was ever done at any of these examinations to see that Coleman's deposit ledger, the most important single book in the bank, was correctly kept.*

And, again, the by-law mentions as another reason for the examination *"for the purpose of ascertaining whether . . . the condition of the Bank is in a sound and solvent condition."* As just pointed out, this could not be ascertained until something in the nature of a verification of the liabilities was made; and this was never done.

That the law requires the directors of a bank to examine, or cause to be examined, their bank with reasonable frequency and in a thorough manner is clear, and the authorities are cited later. It is sufficient to say that it is established almost beyond a reasonable doubt in this particular case (1) that the directors made only two examinations during a period when they should have made at least six; (2) that they skipped examinations, particularly the last one, at a time when Coleman was doing his heaviest stealing; (3) that at the two so-called examinations they neglected to comply with the terms of their by-law; and (4) that, whether the by-law was of binding force or not, they neglected to take the plain precautions

and do the self-evident things without which each "examination" was a mere farce so far as arriving at any definite conclusions on the main questions, namely, the solvency of the bank, the existence or non-existence of a shortage, and the manner in which the books were kept.

Had this neglect not occurred the bank would be running today, as Coleman's thieving would have been detected at an early date.

The Circuit Court of Appeals mentioned that the special master and the District Court found differently on this question as to the number of times the directors met to examine the bank, but did not think it necessary expressly to sustain either. It did not reverse the District Court in the matter, however (Record, p. 1652).

SPECIAL WARNINGS RECEIVED BY THE DEFENDANTS.

It is fully pointed out by the opinion of the District Court that the books of the bank, particularly the deposit ledgers, furnished the most complete warnings that something was wrong from a very early date in Coleman's thefts. They contained, as has been shown, very many false charges, false credits, dropped balances, raised balances, false additions, unfooted columns, erasures, private memoranda, and similar matters. Also that the comparisons between the deposit ledger and the cashier's book most of the time would, if made, have shown startling discrepancies. This condition of the books was a constant warning open to all the directors. It was possible easily to ascertain that a shortage existed, but much more difficult to find the exact amount thereof—a dif-

ferent proposition. But there were other warnings given and ignored.

Coleman's Automobile.

In 1907 or 1908 (the exact date did not appear) Coleman purchased a high-powered automobile, frequently came to the bank in it, and left the bank in it, and continued to own it until the bank closed. He used it openly, taking the cashier and defendant Barber to ride in it, and inviting the president, who, however, did not accept. It was known Coleman's salary was small (as a fact it never exceeded $12 weekly), and although this use of his automobile caused citizens of Cambridge who knew his position in the bank to comment unfavorably to Edwin Dresser, to Mr. Barber, and to the cashier, and although all the defendants knew more or less about the matter, none of them ever made any investigation, although a few perfunctory inquiries were made to Earl and passed on to Coleman, whose statements were accepted without question (see Testimony of Campbell and Wetherbee, Record, pp. 289, 291; also pp. 1249, 1295, 1324, 1325).

Coleman's Stock Speculations.

From an early date in his stealings Coleman speculated extensively in stocks, and continued so to do until a few weeks before the bank closed, dealing in his own name with various Boston brokerage houses. Lockhart, admittedly a truthful witness (p. 36, this brief), testified to the openness with which this was done (Record, pp. 864-866). And Edwin Dresser admitted in his testimony that he had heard Coleman talk about

one or two copper stocks that he said he was going to buy (Record, pp. 1166, 1167).

He tried to modify this testimony (Record, p. 1179), but without much success, and acknowledged he never paid any attention whatever to the matter. The legal significance of knowledge or notice of an employee's speculations is discussed in *Preston* v. *Prather*, hereinafter referred to.

Knowledge of Coleman's stock speculations is brought home to Edwin Dresser alone of these defendants.

The Fillmore Warnings.

Wellington Fillmore, a responsible business man of Cambridge and a depositor in the bank, whose testimony was found by the master to be true (Record, p. 88), testified fully regarding a loss of some money left in a pasteboard box in the bank, which loss pointed clearly to theft. There is nothing in the case more important on the question of liability than Mr. Fillmore's testimony. *The master sets it forth (Record, pp. 86-88, incl.), but leaves out one important sentence in it, although he finds Mr. Fillmore had the conversation with Edwin Dresser which he testified to. This was in October, 1908. Mr. Fillmore testified, referring to his talk with Edwin Dresser, "I told him that it was very evident that there was a thief in the bank, that the money had been stolen. I would advise you to look after Coleman, for I believe he is living a pretty fast pace, and I have pretty good authority for believing he is supporting a woman."* These statements appear in the record, pp. 294-298, and are found as facts by the District Court (Record, p. 204), the Court accept-

ing the special master's finding that Fillmore was a credible witness. It has never been claimed that Fillmore's testimony was not true in every respect.

It will be noted in Mr. Fillmore's letter of September 29, 1908, to the president of the bank (Record, pp. 295-296) that he says that on one occasion, referring to his package, it was "handed to me, I think, by Mr. Earl by mistake for another package of silverware belonging to me." This makes it probable that the money disappeared *after* Mr. Earl and Coleman came into the bank. On the cross-examination of Mr. Fillmore he also testified (Record, pp. 297, 298) that he informed Edwin Dresser who was his authority for making the statement which he had made regarding Coleman, so it appeared that Mr. Fillmore was not repeating unauthentic rumors.

In spite of the fact that the warnings were direct and specific, that the suspected person was named, that the authority for some of the charges was given, and that the letter was written to Edwin Dresser as president of the bank, and he was requested to bring the matter before the board of directors of the bank, Edwin Dresser apparently filed the warning in the waste basket. He paid no attention to the letter. He paid no attention to the conversation. He did not put the matter before any of his directors (Record, p. 299). *He caused no examination to be made and no investigation to be made beyond, possibly, asking a few questions of Earl.*

There is no actual *proof* that Coleman stole the $150 which Mr. Fillmore lost. But prior to that time three tellers in succession had had trouble with their cash. Roaf had trouble on four or five occasions, the

aggregate amount short being nearly $1200, of which much the larger portion was never traced. Bragg had trouble to the extent of $25, none of which was ever traced. And Cutting had trouble on four occasions to a total of $700, none of which was ever traced. These shortages all took place while Coleman was in the bank, and, there being no cage, it was possible that he was the one responsible. Cutting had also, when he found his cash short, warned Mr. Dresser there was a thief in the bank. No claim is made but that Roaf, Bragg, Cutting, and Earl were honest men, and, although not actually proved, it is difficult, when all the circumstances are taken into consideration, to reach any conclusion other than that Coleman himself was responsible for Fillmore's loss and for most of the shortages of the tellers.

It is true Coleman denied these particular thefts, but he knew it was impossible to prove his guilt in connection with them, and they were thefts of a peculiar meanness. As regards the money in Mr. Fillmore's package, it had been saved by a poor old woman for her burial expenses. As regards the tellers' shortages, these thefts cost two innocent men their positions in the bank and made all three pay money they did not owe and which they could ill afford to lose.

If Edwin Dresser had paid sufficient attention to Fillmore's specific warnings and charges to have had the deposit ledger examined, a big defalcation would at once have been discovered and the subsequent thefts stopped. The letter was dated September 29, 1908. On that day two raised balances, of $60 and $8000, respectively, appeared on the deposit ledger, and the

balance columns on pages 3, 5, and 11 were falsely added. The total due depositors as per the figures on Coleman's deposit ledger exceeded the same item on Earl's ledger by $37,250, and the correct addition of Coleman's balance columns exceeded the total due depositors on Earl's ledger by $46,310. All of which is pointed out in the District Court's opinion (Record, p. 205).

A similar situation particularly as regards incorrect additions of balance columns on the deposit ledger, and as regards wide discrepancies from the totals on the deposit ledger and the totals on the cashier's ledger, continued during October and the time of the personal warning or conversation. See the findings of fact made by the special master on the testimony of Fraser, the expert, agreed by all to be correct, set forth in the record (pp. 1535-1541).

Both the District Court and the Circuit Court of Appeals hold Edwin Dresser was legally bound to heed these warnings and was responsible for the disastrous consequences which followed his failure to do so (Record, pp. 204-205, and pp. 1657-1659).

THE APPARENT DROP IN THE DEPOSITS. EXHIBIT 56.

It was testified that at each of the regular Monday meetings of the board of directors a statement of the condition of the bank was submitted by the cashier, taken from his general ledger, the statement being always a brief trial balance taken as of the close of business on the previous business day. A bundle of these exhibits was marked "Exhibit 56" (see Record, pp. 1408-1431, inclusive). It is not disputed that during the period of Coleman's thefts (November 24,

1906, to February 21, 1910) the number of the depositors in the bank increased somewhat, and the total of the deposits also increased. Each one of these statements contained the item "Deposits" and the figures of the same, the entire item representing the total amount due the depositors at the close of the day of the statement as same appeared on the cashier's ledger.

The statements show on January 9, 1909, and January 16, 1909, the deposits according to the general ledger had reached the figures $365,315 and $367,210, respectively. The true deposits on those dates were, however, something over $50,000 additional, Coleman's defalcations on those dates being considerably in excess of $50,000.

By the statement on May 8, 1909, the deposits by the general ledger appear as $340,859, and the true deposits were be[illegible]e.. $70,000 and $75,000 in addition.

From this time his stealings were so large that most of the statements showed decreases in deposits from the previous statements. This was not always so. There were spurts, as, for example, on July 24, 1909, when depositors had put in so much money that the deposits appeared as $335,776, although Coleman had then stolen in excess of $100,000. And on August 7, 1909, the deposits appeared as $341,548, although by that time he had stolen not less than $107,000 or $108,000. From this time the drop, as shown by the statements, was fairly rapid; *i.e.*, Coleman was stealing money so fast that even the depositors, though making praiseworthy efforts, were unable to keep the deposits on the books as high as $300,000.

For example, on September 25, 1909, the deposits appear at $283,285, which must or should have been recognized as a very low figure. It was over $80,000 loss in deposits since January 9 in a year of prosperous business, and with no reason shown.

On October 30, 1909, the deposits appeared to have shrunk to $252,392, a drop of about $31,000 in a trifle over a month.

On November 20, 1909, the deposits appeared to have shrunk to $199,354, a drop of about $53,000 in three weeks.

On December 18, 1909, the deposits appeared to have dropped to $156,685, a drop of about $43,000 in a trifle less than a month.

Then on January 29, 1910, the deposits appeared to have dropped to $132,957, or another drop of over $23,000 in six weeks.

The percentages of the drops above stated are very high for very short periods; and a drop of $40,000, while only 10 per cent of the deposits if we start with $400,000, is 20 per cent if we start with $200,000.

Of course there were fluctuations, and occasionally the deposits seemed to come back a little, but the figures just given fairly tended to show a general running down of the deposits, not slowly, but in a rapid and, as the evidence shows, unprecedented way.

Defendants cannot claim that they did not know deposits were falling, that they did not see the books, etc., that they left the entire matter to the cashier, etc., as they claim regarding many other matters, for the statements in Exhibit 56 were before them at their directors' meetings. These meetings were supposed to be held weekly, but were frequently skipped.

As is found by the special master and by the District Court, the directors' meetings were quite irregular during the heavy stealings in May, June, and July, 1909. No meetings were held on May 17, May 31, June 7, June 14, June 28, July 7, or July 14 (Record, pp. 66, 193, 1428, 1429). In these three months Coleman was stealing more than $36,500. So in September, 1909, two meetings were skipped. In that month he stole $17,350. But plaintiff admits that, considering what was done at directors' meetings when they were held, if other directors' meetings had been held, nothing effective would have been done.

These statements in Exhibit 56 were a warning, and should have led the directors or some of them to have inquired (1) what depositors were leaving the bank, or (2) what accounts were being drawn down. If either of these inquiries had been made, and definite answers insisted upon, the startling fact would have appeared that no depositor had withdrawn, and either that no depositor had drawn down his balance to unusually low figures, or, if it appeared that some individual depositors had *apparently* drawn down their balances to abnormally low figures, *and such depositors had been telephoned to or otherwise inquired of,* it would have appeared that their accounts had been manipulated and that they were still carrying their usual balances. Absolutely nothing in the way of a *real* investigation was attempted. (See the manipulations of Edwin Dresser's own account, Record, p. 1122.)

Plaintiff is not unmindful of the somewhat rambling attempts of the defendant Sumner Dresser to make it appear that some investigation or attempt

at an investigation was occasionally made (see Record, pp. 1298, 1306, 1318, 1320, 1326, 1327, 1333, 1334, 1335-1349). The gist of his entire testimony is that the directors did some guessing and stopped there. It does appear from the testimony (pp. 1335, 1302) that, apparently on one occasion, inquiries were made of Mr. Earl as to what depositors were drawing out money, and the Cambridge Savings Bank, the Holy Ghost Hospital, and the City of Cambridge were mentioned. Even if all three accounts had been entirely withdrawn, they would have accounted for but a small fraction of the shrinkage. Coleman never made false entries on the City of Cambridge account or the Cambridge Savings Bank account. These, moreover, were accounts which it was not unusual to have drawn down to a low figure (Record, pp. 1339, 336, 349). Sumner Dresser's testimony does not show when these three names were furnished, but, as the Holy Ghost account was frequently short on the deposit ledger, it is quite probable that, if inquiry had been made of the Holy Ghost Hospital why it was carrying such a small balance, the fraud would have been discovered.

Yet at this very time, when the shrinkage in total deposits was, according to the books, growing rapidly, the depositors were daily putting into the bank rather more than the average amount in corresponding months of former years. See cross-examination of Sumner Dresser (pp. 1315, 1316), where he was compelled to admit the depositors were putting as much money into the bank as ever, and reached the lame conclusion testified to on page 1317:

"*X-Q.* 182. But you must admit that the bank

had not lost depositors and had not lost deposits and that the deposits made day by day over the counter were as large as or larger than they had been many months previously. *A.* But we didn't know that they were. *We assumed that they were smaller.*"

A glance at the cashier's ledger would have shown the assumption unwarranted.

An examination of the entire evidence shows that, while certain inquiries were made regarding the apparent dropping off of the total deposits, such inquiries were made for the most part of Earl, who asked Coleman the reason and took Coleman's not very plausible explanations and passed those explanations on in good faith to the directors, without himself making any investigation. (See, on this subject, Record, pp. 1170, bottom, 831, 833, 837, 844, 1248, 1263, 1264, 1272.)

The defendant Sumner Dresser probably got his information, in part, at least, from Coleman. On cross-examination (p. 1318) he testified to making inquiries of Earl and Paul (the teller who succeeded Coleman in November, 1907), and, when pressed as to whether he did not get part of his misinformation from Coleman, denied it, and testified that "he couldn't see how anybody could know about it [*i.e.*, the loss on deposits] but Mr. Earl and Mr. Paul." He made this statement in spite of the fact that Coleman, who kept the deposit ledger, would, of all those in the bank, necessarily have the most intimate knowledge regarding details of any loss of deposits.

Edwin Dresser frankly admitted that he made in-

quiries of Coleman (p. 1170, Qs. 98-101). It would appear from his answers that he did not make inquiries until within about four months from the time the bank closed. Sumner Dresser, by the way, seemed to consider the less he knew about the bank's affairs the less liable he was to be held. He testified almost eagerly to an extraordinary lack of information. He was unable to testify whether Coleman had or had not at any time been teller as well as bookkeeper (p. 1327), although it was later agreed by all parties and found by the master and the District Court that Coleman was both paying and receiving teller for two years and one month, during which time Sumner Dresser was a director, and was also assistant treasurer of the Standard Diary Company, which company kept one of the large accounts in the bank. He also testified (pp. 1330-1331) that he did not consider it his duty as director to know something about the habits of the bank's employees; that he knew of no reason for investigating Coleman or his habits, and did not do it. He even, though claiming at all times to have been a competent bank director, said he did not know whether a man acting as both bookkeeper and teller could easily pocket a hundred dollars and wrongly charge it into some account (Record, p. 1329).

The defendant Gale apparently had a similar lack of interest. He did not remember that Coleman had been teller (p. 1351). He even went so far as to claim (Record, p. 1263) that it was the cashier who was managing the bank and not the directors.

OTHER NEGLIGENCE.

There were other negligent acts or omissions on the part of the several defendants, which need not be gone into in much detail; for example, none of the defendants knew how the cashier had turned the handling of the Clearing House envelope and its contents over to Coleman, although some, at least, of them knew that Davis, the preceding cashier, had himself personally attended to this duty (Record, pp. 80, 1187).

They all knew that the cashier's records of what took place at directors' meetings were extremely defective, he sometimes not even putting down who was present (meetings of June 3, 1907, and February 28, 1908), and nearly always omitting any reference as to what was done at the meetings after the approval of the minutes of the preceding meeting. (Sample minutes of directors' meetings are found on pages 1254 and 1255. The records of the great majority of the directors' meetings are identical, except for dates.)

They did absolutely nothing at any time in the line of a real investigation into the causes of the great apparent shrinkage in the bank's deposits.

They concurred in having no audit or careful examination made of the bank after the Wright audit in the summer of 1903—almost seven years without an audit (or equivalent) of the bank's condition!

The directors left everything, except the matter of the loans, to Earl, the cashier, without any attempt to supervise his work. *And in this connection it is interesting to consider that, while the stealings were going on, everything, aside from the specific warnings, seemed to point to Earl as the one most likely to be*

the defaulter, if there was a defaulter, for he had power to sign the bank's checks on its correspondent banks, and, either alone or in collusion with the bookkeeper, to manipulate the books to an almost unlimited extent. Yet even his doings were never inquired into.

Some specifications regarding the negligence of the defendants appear further on in this brief, and in this connection the language of Chief Justice Rugg in *Bou v. Graves,* 216 Mass. 447, is applicable, where, in sustaining a decree setting aside a mortgage alleged to have been foreclosed fraudulently, after stating the various circumstances attending the foreclosure, he says:

> "No one of these circumstances standing alone would show bad faith on the part of Graves in making the foreclosure. But collectively they gain a force which they fail to possess separately."

So far as Edwin Dresser is concerned, the disregarded Fillmore warning alone is enough to make him liable, as held by the Circuit Court of Appeals, for $264,088.02, but, as regards all the defendants, the quotation just given is peculiarly applicable.

Richardson's Connection with the Bank.

The defendant Richardson's case differed in many respects from that of the other defendants. It is fully gone into both in the master's report and in the opinion of the District Court, and there is little dispute regarding the facts. Richardson was paying teller at the New England Trust Company in Boston, and a man of middle age. He had inherited some

eighty shares of stock in the National City Bank from his father, who many years before was its cashier. He was elected and became a director in January, 1907, although he had told Edwin Dresser, the president, that his business kept him in Boston, that he would not be able to attend directors' meetings, and generally that he ought not to serve. His health was poor. Edwin Dresser, who appears to have been a masterful kind of man, disregarded Mr. Richardson's protests, and insisted that he serve, and thereafter Mr. Richardson, still protesting, was elected, in January, 1908, 1909, and 1910, and each time qualified by taking the required oath. He rarely attended any directors' meetings, and the lack of a quorum, as a result of which a good many meetings were skipped, was very frequently due to his absence, the other directors being fairly regular in their attendance. It was peculiarly unfortunate for the bank that Mr. Richardson was unable to attend these meetings, for, a bank employee himself, it is highly probable that he would have investigated or made inquiries and detected Coleman's misdoings. Legally, the fact that Mr. Richardson knew he would be unable to attend to his duties as a director, and so stated to the president (but not to the depositors), cannot in any way operate to relieve him from liability. On each occasion when he accepted his election and took the qualifying oath he became legally bound in like manner and to the same extent as the other directors, whether he then knew that he could not attend to the duties or whether he did not know it. The master declined so to rule, but the Court has so ruled (Record, p. 203), and no authority that a dummy director stands

on any different basis in law from a director not a dummy has been adduced. The Richardson matter is of interest as showing how lightly Edwin Dresser regarded the duties of a director of a national bank. He urged and persuaded Richardson against his will to become a director, though undoubtedly assured by Richardson that he could give almost no attention to his duties. Perhaps it was partly on that very account. By this act Edwin Dresser deprived the bank of the services of a real director, who could give his time and attention to the bank's affairs, and this undoubtedly facilitated the catastrophe that followed. It is true the stockholders of a national bank elect the directors. Technically, therefore, there may be no legal liability so far as this one matter is concerned, but as a piece of evidence the fact is to be considered.

The master recites some of the facts regarding Richardson (Record, p. 80), and includes the following statement: He "was accustomed to consult with Mr. Dresser and perhaps other directors in Boston, in regard to the business of the bank." The evidence to that effect was trifling, and it is certainly not common for a corporation president to do much consulting with the dummy directors on the board. But in view of the rulings of the Court this particular matter is now of little importance.

Conclusions.

The following conclusions are fully justified, and indeed are almost irresistible. They are in full accord with the opinion of the District Court, and for the most part, though not wholly, seem to be in accord with the opinion of the Circuit Court of Appeals.

The bank was a one-man bank (*cf.* testimony, Record, p. 1278). There was no discount committee. Edwin Dresser, virtually unassisted, decided upon the discounts, and, while the lists were read at the directors' meetings, they were always approved, and his action in no respect was ever criticized. Even when it came to declaring dividends, where the directors had to take action, for several years before the bank closed the usual form of vote was that a dividend of 2½ per cent is declared payable ". . . if the President may deem it advisable" (Record, pp. 1378-1379).

And routine matters of the bank, deposits, payments, collections, keeping the books, etc., were left by the directors to the cashier, without any supervision whatever. Plaintiff quotes from cross-examination of defendant Gale (Record, p. 1250):

> "*X-Q.* 59. What, if anything, did you do in regard to seeing how the bank was run, on the inside, I mean, as regards the teller, the bookkeeper, and the cashier; how they were performing their duties? *A.* I did nothing."

Mr. Dresser's treatment of the tellers found with shortages in their cash, the small salaries paid to Coleman and others in positions of responsibility, and similar matters, all show he was inclined to extreme parsimony. This undoubtedly is the reason why he relied on the semiannual examinations of the bank by the national bank examiners, each of which cost $25, rather than upon an occasional audit, which, like the Wright audit, would have cost a much larger sum. Indeed, the defendant Gale frankly so stated (Record, p. 1259):

"*X-Q.* 135. And why, Mr. Gale, from that time down to the close of the bank, did not you ever have another audit made of the bank? *A.* Principally because it would cost something."

As regards the bank employees, while Earl was Coleman's official superior and Paul, the teller, his official equal, from the time Paul came to the bank, in November, 1907, it is clear that Coleman's personality was the dominating one in the banking rooms. Earl did clerical work, almost entirely of a routine nature, apparently in a satisfactory way, but exercised no real supervision or control over Coleman. Even the master's report shows this pretty clearly. Certain testimony of Coleman on cross-examination, which, as the final collapse of the bank shows, corresponds with the undisputed facts, is illuminating on this point (Record, pp. 745, 746).

"*X-Q.* 4298. [By Mr. Morse.] How did you say those tests were made [referring to the comparisons of totals by Earl and himself between Earl's general ledger and Coleman's deposit ledger]? *A.* Why, I added up those fourteen pages, got the balance of the depositors' column for each of the fourteen pages, and they should agree with Mr. Earl's book."

"*X-Q.* 4299. How, in fact, was that comparison made,—I mean did Mr. Earl produce his book, and you and he make the comparison? *A.* Oh, no; I simply walked over to his book and compared them, if I made the comparison.

"*X-Q.* 4300. This was a regular occurrence

twice a week, was it? *A.* Supposed to be done twice a week; yes, sir.

"*X-Q.* 4301. What reason was given for its being omitted on these occasions. *A.* None.

"Mr. Nay. I thought you made a comparison every day.

"Witness. On the checks and deposits.

"*X-Q.* 4302. If the comparison was not made twice a week it was because you and Mr. Earl for some reason or other decided not to make it, wasn't it, or omitted to make it? *A.* I don't know that Mr. Earl had anything to do with it, because I decided not to make it.

"*X-Q.* 4303. Yes, but if Mr. Earl was in the habit of making the comparison, why shouldn't he have said something about it? *A.* Well, he probably forgot it, or left it to me, or presumed that I did make it."

Coleman possessed pleasant manners, was bright and alert, and doubtless something of a favorite with Edwin Dresser. Sumner Dresser refers to him (p. 1295) as "a very capable and bright young man, and was a coming man in the bank." The last expression seems to indicate Coleman was in the due course of events to succeed Earl as cashier, which is likely enough. Liking Coleman and trusting in him, Edwin Dresser resented any talk against him, such as indulged in by Fillmore, Campbell, Lombard, and others, and declined to pay any real attention to it, or even to call it to the attention of the directors, some of whom might have proved less complaisant. This stiff-necked attitude on his part was one of the principal causes of the bank's failure, because it en-

abled Coleman to continue his stealings unhampered by any audit or other investigation.

As regards the other directors, the attitude seems to have been one of indifference and lack of interest and failure to give attention. And, except in the case of Barber on one occasion, it does not seem to have been a disregard of warnings; and in Barber's case the warning, while aimed at Coleman, did not mention him by name.

Specifications of Negligence.

It is fairly established by the evidence that the defendants were negligent in the following matters:

1. In putting a boy less than eighteen years of age in sole charge of the deposit ledger in the bank, probably the most important book in the bank, and "one which it was unsafe to let go a day with errors not found." (Applies to E.D., G.W.G., and S.D. only.)

2. In retaining him as such bookkeeper without ascertaining how frequent and careless were his mistakes—either not knowing or not caring.

3. In disregarding the plain warnings of Mr. Wright, the auditor employed by the bank in 1903 and 1904—warnings made in writing in an official communication to the directors, regarding the importance of this deposit ledger and the care with which it should be kept. (Applies to E.D., G.W.G., and S.D. only.)

4. In causing no supervision to be kept over this young bookkeeper. Or, if it is seriously contended that they thought Mr. Earl was keeping some such supervision, in never ascertaining that Earl was doing nothing of the kind.

5. In being ignorant that Earl had violated t
wise methods of his predecessor as cashier (Recor
p. 80), and was actually permitting the bookkeeper
open the Clearing House envelopes and take out t
checks, Earl himself, for the most part, never seei
the checks or paying any attention to anything in t
clearing except the total.

6. In giving no weight to the extraordinary fa
that three tellers in succession were short in the
cash, all experienced men, all denying any respons
bility in the matter, when the arrangements at t
bank, and the lack of a cage, made it perfectly a
parent that some one else within the bank might
the guilty party. (Applies to E.D., G.W.G., and S.
only.)

7. In making Coleman teller as well as bookkeepe
and thereby rendering it perfectly easy for him
steal, and conceal his stealings in inactive accoun
with almost no chance of detection. (The stealin
involved in this suit began while this was the situ
tion, and over $30,000 was stolen while it continue
(Applies to E.D., G.W.G., and S.D. only.)

8. In assuming, if they ever thought about it
all, that the bank examiner's necessarily rapid e
aminations twice a year, when they knew most of t
time was spent by the examiner on the loans and t
collateral, was the equivalent of an audit—no ba
examiner or anybody else ever having made any su
statement to any of the defendants, and their assum
tion being nothing but assumption—and making th
assumption in the face of the fact that three of the d
fendants (E.D., G.W.G., and S.D.) knew that a re
audit had taken seven or eight days' time of a comp

tent man and his assistant, and at a time when the bank had fewer accounts than during the time when Coleman was bookkeeper.

9. In neither making nor causing to be made any investigation regarding the habits and methods of life of Coleman, a very young man, who held an important position in the bank, and part of the time two important positions, and for over two years was, as teller, daily handling considerable sums of cash, while his salary was at all times very small.

10. In neither making nor causing to be made any real investigation of the remarkable fact that a $12-a-week bookkeeper was able to own a good automobile and to run the same. (This does not apply to the defendant Richardson, who, being rarely at the bank, probably knew nothing about the automobile.)

11. In ignoring the plain and specific warnings of Mr. Fillmore, both the spoken warning and the warning contained in the letter. (Applies to E.D. only.)

12. In disregarding Mr. Lombard's plain warnings regarding Coleman, given originally to Earl, and reported to Mr. Dresser with Coleman's excuses, more than six months before the bank failed, and accepting these excuses and letting the matter drop (Record, p. 306). (Applies to E.D. only.)

13. In not paying any attention to the criticisms of H. Douglas Campbell on a matter which had clearly, at the time Campbell made such criticisms, become the subject of comment in Cambridge, to wit, that a bank clerk on small salary was able to run an automobile. (Applies to E.D. only.)

14. In refusing to perform a plain duty and call the contents of Mr. Fillmore's letter to the attention

of the board of directors, as requested, and in refusing to report Mr. Lombard's warnings to the directors. (Applies to E.D. only.)

15. In permitting numerous meetings of the directors to be skipped without adequate excuse.

16. In disregarding, for long periods and without any excuse, the express provisions of the by-law requiring semiannual examinations by the directors, and comparisons to ascertain if the books were correctly kept.

17. After becoming aware that Coleman was either buying or selling copper stocks, utterly disregarding that fact, and not calling it to the attention of the directors, although Coleman's salary was known, and there is no evidence that Coleman had any outside means. (Applies to E.D. only.)

18. In persuading Richardson to become a director when it was known that Richardson would be unable to attend to his duties as a director, and in never taking steps to secure an efficient director in place of one who was so situated that he could not give the proper attention to his duties. The frequent lack of a quorum and failure to hold a directors' meeting was in most cases directly due to the fact that Richardson was on the board, and was unable to attend the meetings. (Applies to E.D. only.)

19. In doing nothing particular as to investigating the causes while the deposits of the bank were apparently shrinking from about $368,000 to about $107,000, and in making no real investigation as to the cause or causes.

20. In accepting totally unfounded guesses of Mr. Earl and of the other directors of the bank as to the

real causes of the apparent shrinkage, when any investigation would have disclosed how unfounded and out of line with easily ascertained facts these guesses were.

21. In having no audit or careful examination of the books of the bank after July, 1903, a period of almost seven years.

22. In permitting Coleman, then aged less than twenty, to have the combination of the cash-box and actual access to the bank's cash from the time he became teller. (Applies to E.D., G.W.G., and S.D. only, who should have known the facts.)

It will be observed upon examination of the foregoing specifications that the disaster which overtook the bank was not due to the fact that the directors were negligent in *all* the matters specified taken together. For example, if the facts referred to in *any one* of the specifications numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, and 21 had been otherwise, the bank would probably be running today. The evidence discloses considerable other negligence—such as the cashier being permitted to keep his records of directors' meetings in very defective form—which negligence, however, apparently had nothing to do with Coleman's stealings or his concealment of the same.

General Principles of Law Applicable.

As previously stated, there has been from the outset very little dispute regarding the primary facts in the case, the principal contentions being (*a*) regarding conclusions of fact to be drawn from primary facts ad-

mitted or proved, and (*b*) regarding the principles of law applicable. The rules of law, however, are well settled by decisions and by text-books of recognized authority. It can hardly be controverted that, as a matter of law, the directors of a bank may be liable for their negligence in handling the affairs of the bank, even when no dishonesty is to be imputed to them. Stated broadly, this principle, like many legal principles, is somewhat general, and to ascertain the application of the same it is desirable to examine some of the leading authorities.

Plaintiff quotes Michie on Banks and Banking, vol. 1, p. 267, par. 53. The title is:

> "*Rights and Liabilities as to Bank and Stockholders. Nature and Extent. In General. Powers, Duties and Liabilities of Directors. Care and Diligence Required.*
>
> "The directors and officers of a bank are, in a sense, trustees for the depositors and stockholders, and they can be called upon in a court of equity to account for misfeasance in the management of the business of the bank. They are the agents of the corporation, and are liable for an abuse of their trust wherever the agents of an individual would be. The standard of diligence and prudence by which they should be tried is that which business men have erected for themselves. Reasonable conformity to the customs and methods in vogue among prudent bankers is the degree of diligence required of such officers. As regards directors, the law requires of them the exercise of good faith and ordinary diligence and

care, including the duty of reasonable oversight and supervision of the bank's affairs, and they are liable for losses resulting from their negligence or mismanagement of the bank's affairs."

"The degree of care to which they are bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that, the restrictions of statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances. [Many cases are cited, including *Briggs* v. *Spaulding*, 141 U.S. 132.] Other cases have held that directors will not be personally liable for losses, except in cases of gross negligence, amounting to active or passive fraud."

The great majority of the authorities favor the first proposition just quoted rather than the last.

"*Delegation of Duties—Supervision, Inspection, Knowledge of Bank's Affairs.*—Directors are not required to devote themselves to the details of the business, which may be left to the clerks and bookkeepers under the supervision of the cashier. *They are bound, however, in the exercise of the ordinary diligence required of them by law, to maintain a reasonable oversight and supervision of the bank's affairs, and it is gross negligence for them to commit the entire business of the bank to the cashier and his subordinates without supervision or control on their part, even though he*

be an entirely competent man (italics counsel's). While they are not insurers of the competency or fidelity of the cashier or his subordinates, nor liable for their acts upon any principle of agency, nor required to look with suspicion upon the conduct of these agents and employees, nor to practice a system of espionage over the cashier or his subordinates, in the absence of circumstances calculated to excite doubt or suspicion, yet they are required to exercise due care in their selection and *proper supervision* over their actions and conduct of the bank's affairs. *While in some corporations directors may constitute merely an advisory body maintaining only a general oversight as to the affairs of the company, it is not so as to the directors of banks.* [Italics counsel's.] As directors, it is their duty to know the system of management and its daily workings, including the general financial condition of the bank and all important matters in its dealings. They can not escape liability by showing that they were ignorant of the business of the corporation with respect to those matters which it is their duty to know; and if they negligently entrust such matters to others, and loss is thereby incurred, it should fall upon them, and not upon their depositors and stockholders. They are not required, however, to give their whole time and attention to the performance of these duties, but only so much as, under the special circumstances of each particular case, may be demanded for the reasonable protection of the interests committed to their care. And a mere failure to make or cause an in-

vestigation, in a short term of service, nothing appearing to cause suspicion, is not negligence."

See also Bolles' Modern Law of Banking, vol. 1, p. 276:

"The general rule of duty governing directors cannot be expressed in a rigid form. In the earlier days, when business methods were slower and simpler, the law maintained in a fairly satisfactory manner boundaries in the care which individuals were required to exercise while pursuing, under different conditions, their office or employment. But business methods have become so complex that many of these boundaries are disappearing. Between employers and employees, however, the courts are still spinning their distinctions concerning duty and liability with ever-increasing fineness, and thus enhancing the difficulty of both classes to know the law they are required to observe.

"Though the courts no longer seek to measure the differences in care by the old-fashioned rules of slight, ordinary and great it is difficult in comparing one act with another to avoid altogether the use of these qualifying terms. One board of directors is more attentive, more dutiful than another; and in comparing their conduct some words expressing the distinctions between them must be used so long as these exist.

"There are two ways of regarding the duty, care or attention required of a board of directors. One way is to set up an abstract standard or rule and apply this to the board of a particular bank, whose

conduct is the subject of legal inquiry. The other way is to compare their conduct with that of another board which fulfills the legal requirements. The law employs both methods."

The writer then goes on to discuss the matter at some length, and takes up the question as to whether the fact that the directors are or are not paid makes any difference, the conclusion being that, on the authorities, unpaid service does not lessen liability.

See also Morawetz on Private Corporations, vol. 1, sec. 561, which is an exceedingly good statement, and might have been written to fit the case at bar:

"Directors by accepting their appointment to office impliedly agree to give as much time and attention to the interests of the corporation as the proper care of these interests requires. If directors fail to perform the duty thus undertaken, they are liable to the corporation for any resulting loss. Thus, if directors pay no attention to the management of the company's business or the care of its property, and the business is thereby wrecked or the property lost, they may be held responsible by the corporation. So if directors leave entire control over the company's interests to other agents, and fail to exercise the proper supervision, they are liable for breaches of trust committed by those in control, which due care and attention on the part of the directors would have prevented.

"In practice it is often difficult to determine whether a loss caused by the immediate wrong of agents whom the directors have given control over

the company's interests can fairly be attributed to inattention or neglect of duty on t' e part of the directors. Directors are not insurers of the fidelity of their co-directors, or of the agents whom they have appointed. Agents appointed by the directors are agents of the corporation, and not of the directors themselves. Directors cannot be charged with the acts of their appointees on any principle of the law of agency. Directors can be held responsible for a loss resulting from wrongful acts or omissions of other directors or agents only provided the loss was a consequence of their own neglect of duty, either in failing to supervise the company's business with attention, or in neglecting to use proper care in the appointment of inferior agents.

"Thus, if directors of a bank have used due care in selecting a cashier, they are not liable for a defalcation of the cashier which proper attention to their duties would not have prevented. But if a cashier has committed a series of frauds which proper care on the part of the directors would have exposed and thus rendered impossible, the corporation may hold the directors responsible for those losses which resulted through their want of care."

See also Thompson on Corporations (1909 ed.), vol. 2, sec. 1268, reading as follows:

"*Liability Measured by Relation as Trustees.* Another and larger class of cases, and perhaps the best line of authorities, state what is certainly the better doctrine and place the directors of corporations in the relation of trustees to the corporation

and stockholders. The rule maintained by the consensus of these cases is that by reason of their position directors occupy a fiduciary relation and that good faith in the management of the corporate affairs committed to their charge is a primary requisite; that by accepting the position they assume a capacity to manage the business of the corporation, and impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires, and to give the enterprise the benefit of their best care and judgment. They are bound to manage the affairs of the company with the same degree of care and prudence which is generally exercised by business men in the management of their own affairs, and the fact of the service without compensation does not permit a less degree of activity. They must be diligent and careful in performing the duties they have undertaken, and imprudence and negligence cannot be excused on the ground of ignorance or inexperience or the honesty of intention. The entire management of the corporate affairs is committed to their judgment, upon the trust and confidence that the business shall be cared for and managed within the limits of the powers conferred by law upon the corporation and for the common benefit of the stockholders. They are required to act in the utmost good faith and exercise the powers conferred solely in the interests of the corporation. They are bound to exercise ordinary diligence, to be attentive to their duties, to attend meetings of the board, to supervise, control, examine and inquire into the business and affairs

of the corporation even where its active management has been left to the control of executive officers. They are not permitted to evade or delegate their powers and important duties, and their supervision must be such as would enable them at all times to know the general financial condition of the corporation and to check or prevent any imprudent or dishonest conduct in officials; they must use in such position their best discretion and industry; and show the same scrupulous bona fides and conscientiousness which is exacted rigorously from all trustees of the property of others. *They are bound to know the character and habits of the officers whom they employ and they cannot be heard to say that they were ignorant of facts, the existence of which is shown by the books and papers of the corporation, and which would be known to them but for their neglect or inattention to the business; and they are responsible for loss resulting from the wrongful acts or omissions of other directors or agents where such loss was a consequence of their own neglect of duty, either in failing to supervise the company's business with proper attention or in neglecting to use proper care in the appointment of such agents.* [Italics counsel's.] While they are not held responsible for ordinary mistakes or errors of judgment, they are liable for losses and waste of money and property occurring from neglect or inattention to the business or the wilful violation of their duties. It is true that the degree of diligence is to be determined in each case in view of all the circumstances, such as the character of the corporation, the condi-

tion of its business, the usual methods of managing such companies, as well as all other relevant facts."

Thompson cites over a hundred cases in support of the propositions laid down. Sections 1273, 1274, and a portion of 1276 of the same work are also in point. They read as follows:

Section 1273:

"*Liability for Gross Negligence.*—Directors are held personally liable for suffering the corporate funds or property to be wasted or lost by gross negligence or inattention to their duties. The Indiana court in a fairly recent case said that directors were liable for losses and waste of money and property occurring through their gross inattention to the business of the corporation and wilful violation of their duties. The rule illustrating this proposition of gross negligence was stated by the Tennessee Court thus: 'Directors, by assuming office, agree to give as much of their time and attention to the duties assumed as the proper care of the interest intrusted to them may require. If they are inattentive to their duties, if they neglect to attend meetings of the board, if they turn over the management of the business of the company to the exclusive control of other agents, thus abdicating their control, then they are guilty of gross neglect with respect to their ministerial duties, and, if loss results to the corporation by breach of trust or acts of negligence committed by those left in control, which by due care and attention on their part could have been avoided, they will be

responsible to the corporation. The diligence required from them has been defined as that exercised by prudent men about their own affairs, being that degree of diligence characterized as "ordinary." If a less degree of diligence is exercised, the negligence is gross, and for losses consequent he is liable.' The fact that directors commit the corporate business to authorized officers was held not to absolve them from the duty of reasonable supervision; nor ought they to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention."

Later on the author says:

"The law is very jealous in exacting the strict and thorough performance of these duties of directors, and it is not enough to exculpate them that no actual dishonesty can be shown. They are personally liable if they suffer corporate funds or property to be wasted or lost by gross negligence and inattention to the duties of their trust."

Section 1274:

"*Directors liable for less than gross negligence.* —Some of the older books and earlier cases are inclined to the doctrine that directors are liable for gross negligence only. In some of them there is a classification into slight negligence, gross negligence, and that degree of negligence intermediate the two, which is defined to be the absence of ordinary care. Following this classification, gross negligence is defined as something approaching

fraud or bad faith, and the liability is limited to such cases. This theory has been bottomed some on the absurd proposition that as directors serve without compensation, little supervision is required of them, and they were only held responsible for acts approaching fraud or bad faith. It is refreshing to note that this doctrine has found no extensive abiding place in the law of corporations and its practical application to the position and duties of directors. While the term 'gross negligence' is still used in some recent cases, it is in the sense which the enlightened jurisdictions of the day have given to that term, and no attention is paid to the classification above given. This gross negligence doctrine received, if not a final, a vital blow at the hands of the New York court, where Judge Earl said: 'It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia,* which literally means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case.' "

Then he cites with approval a portion of paragraph 554 from Morawetz, and goes on to say that directors

have large powers and important duties which they can neither evade nor delegate; that the statutory obligations are voluntarily assumed, and the directors are bound to perform them; that their supervision must be such as will enable them at all times to know its general financial condition; that they are bound to know the character and habits of the men they have placed and kept in charge of the bank; that there can be no excuse for a failure to examine the books of the bank, and for ignorance of the manner in which its business is conducted, and that under the statute they are liable to account for all the property of the corporation which has been entrusted to their control and management. He goes on to say:

> "It is incumbent upon directors to possess a general knowledge of the character of the transactions of the business and the manner in which they are made; they are bound to possess a general knowledge of the manner in which business is transacted, and to maintain such a degree of vigilance over and intimacy with the business as will enable them to know to whom and upon what security the large lines of credit are given. Their duties are largely administrative and relate to supervision and direction of the corporate affairs; they cannot evade liability when sued for dereliction of duty, by pleading ignorance of the affairs of the corporation, incompetency, or gratuitous service, or that the management of the corporate business was in the hands of executive officers."

Section 1276:

> "*Liability for negligent ignorance.*—The fact

that directors of a corporation do and must commit the details of its business to executive and inferior officers does not absolve them from the duty of maintaining a reasonable supervision, and if such officers waste the assets of the corporation, the directors, ordinarily, cannot escape liability on the ground that they did not know of the wrongdoing, where it is made to appear that their ignorance was the result of a want of that care which ordinarily prudent and diligent men would exercise under similar circumstances. On this liability for negligent ignorance of the director the New York Court said that 'he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties.' ''

Section 1277 disposes of the claim that unpaid service relieves directors from liability. It does not seem necessary to quote it.

The case of *Rankin* v. *Cooper et al.*, 149 Fed. Rep. p. 1010, is important. This was decided in the United States Circuit Court of Arkansas in 1907. It is a suit

against directors for negligence, and the presiding judge summarized the United States law in the following words (at page 1013):

> "Briefly summarized, I understand the law on this subject to be as follows: (1) Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. (2) They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. (3) Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances. (4) The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. (5) If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with

the bank, shut their eyes to what is going on around them. (6) Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank. (7) It is incumbent upon bank directors in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency." Then the Court cites a number of Federal cases, from which these rules are deduced.

Rankin v. *Cooper* has been cited with approval in *Williams* v. *Brady*, 221 Fed. Rep. 121.

It is not claimed, however, that the facts in that case are at all similar to the facts in the case at bar.

Of course, technically, the directors of a national bank are not trustees, since they have no title to the assets of the bank, but the tendency of modern decisions has been, in accordance with text-writers just quoted, to hold that they act in a fiduciary capacity. See *Greenfield Savings Bank* v. *Abercrombie*, 211 Mass. 252. Defendants in that case had the title "trustees," as it was a case involving a Massachusetts savings bank, but they were not trustees holding title to the assets of the bank. In most respects their duties and responsibilities were similar to those of the directors of a national bank. See also the following cases on the general question of the fiduciary relationship between directors and their corporation:

Henry L. Doherty & Co. v. *Rice*, 186 Fed. Rep. 204.
Ashville Lumber Co. v. *Hyde*, 172 Fed. Rep. 730.
Canton Roll & Machine Co. v. *Rolling Mills Co.*, 168 Fed. Rep. 465.
Field v. *Western Life Indemnity Co.*, 166 Fed. Rep. 607.
Singers-Bigger v. *Young*, 166 Fed. Rep. 82.
Pepper v. *Addicks*, 153 Fed. Rep. 383.
M'Court v. *Singers-Bigger*, 145 Fed. Rep. 103.
Kessler & Co. v. *Ensley Co.*, 129 Fed. Rep. 397.
McGourkey v. *Toledo Railroad Co.*, 146 U.S. 536.
West v. *Camden*, 135 U.S. 507.
Woodstock Iron Co. v. *The Richmond Extension Co.*, 129 U.S. 643.
Hollins v. *Brierfield Coal & Iron Co.*, 150 U.S. 371.
Thomas v. *Railroad Company*, 109 U.S. 522.
Wardell v. *Railroad Co.*, 103 U.S. 651.
Twin-Lick Oil Co. v. *Marbury*, 91 U.S. 587.
Williams v. *Brady*, 221 Fed. Rep. 118; s.c. 232 Fed. Rep. 740.
Klotz v. *Pan-American Match Co.*, 221 Mass. 38, 41.

A leading case on the question of directors' negligence is *Briggs* v. *Spaulding*, 141 U.S. 132. In this case the Court divided, five justices concurring in the majority opinion by Chief Justice FULLER,

and four concurring in the dissenting opinion of Mr. Justice HARLAN. The facts are not similar to the case at bar, but the principles set forth by the chief justice in the majority opinion are ample authority for holding defendants liable in the present case. The majority opinion has been somewhat criticized in subsequent decisions as well as by text-writers, as going too far in favor of directors, but the case has never been overruled and may be regarded as law today. It goes, however, to the very extreme in favor of directors made defendants in suits based on negligence, and it is not improbable that, if the same case was to come up today, the views taken by the minority would prevail. It is, however, not necessary for this Court to modify in the slightest degree the law laid down in that case, but it has merely to apply the principles to the facts of this case, and the plaintiff will be found entitled to recover.

Almost equally important is *Preston* v. *Prather*, 137 U.S. 610, which has a special bearing on the question of knowledge by a bank director or official that one of the bank's employees is speculating. It holds in substance that, if information that an employee is speculating comes to the ears of a bank director or official, it is his plain duty to investigate the matter thoroughly, and if he disregards the warnings or intimations, he does so at his peril, and may be personally liable in the event of subsequent theft of the bank's funds by such employee. This is directly in point of view of the admissions of Edwin Dresser as to hearing that Coleman was interested in copper stocks, supported by the testimony of Lockhart as to the openness with which Coleman carried on his speculations. Counsel for

Edwin Dresser, Sumner Dresser, and Gale admitted Lockhart was a reliable witness.

See also *Martin* v. *Webb*, 110 U.S. 15, in which Mr. Justice HARLAN, speaking for a unanimous Court, says, in a bank case, where the question was the authority or apparent authority of the cashier in a certain matter:

> "Directors cannot, in justice to those who deal with a bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to use reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the Bank, and to make declarations of dividends. What they ought, by proper diligence, to have known as to the general course of business in the Bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

A fortiori they should be held to such knowledge when brought into Court to answer the receiver who represents the innocent depositors and stockholders who relied upon them, trusted in their diligence, and have suffered as a result.

See also *Campbell* v. *Watson*, 62 N.J. Eq. 396.
Ellis v. *H. P. Gates Mercantile Co.*, 103 Miss. 560.
Gibbons v. *Anderson*, 80 Fed. Rep. 345.
Robinson v. *Hall*, 63 Fed. Rep. 222.
Warner v. *Penoyer*, 91 Fed. Rep. 587.

Williams v. *Brady*, 221 Fed. Rep. 118.
Williams v. *McKay*, 40 N.J. Eq. 189.
Cockrill v. *Cooper*, 86 Fed. Rep. 7.

Section 5147 of the U.S. Rev. Statutes reads as follows:

> (Oaths of Directors) "Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office."

Each director of this bank annually took this oath. This requirement of statute is probably merely declaratory of the law, and designed to bring each year forcibly before each director the fact that he is bound, not only to be honest, but "diligently to administer the affairs" of his bank.

The English and the Kentucky Cases.

There are some cases in the English Courts and in the Kentucky Courts which seem to be rather out of

line with the general current of authority on this question of the diligence required of bank directors, and their responsibility for disasters arising out of their lack of care.

Regarding the English cases it will be observed on an examination of them that the English statutes require frequent examinations by chartered accountants, which examinations are in effect, if not in name, audits; and that requirement entirely alters the situation as regards the liability of bank directors who have received no special warnings for losses occasioned by dishonest clerks or employees.

In the case at bar, if an auditor believed to be reputable had been employed by the directors at reasonable intervals to audit the bank, and had, in collusion with the cashier or Coleman, made false reports, assuring the directors that his audits found everything all right, plaintiff admits there might be no liability on the part of any of the defendants, except for the disregard of the special warnings received. Moreover, in Great Britain for many years nearly all banks were not limited-liability corporations, but were joint-stock associations. Each shareholder in a joint-stock association is in legal effect a partner, and liable as a partner for the entire debts of the joint-stock association. About forty years ago the Glasgow Bank, a joint-stock association, failed for an enormous amount, and one of the unfortunate consequences of that failure was the practical ruin of every person who owned a single share of stock. Cases involving the liability of directors for negligence are not likely to occur when every director is a stockholder and every stockholder is a partner and liable as such, irrespective of negligence, to the depositors.

Regarding the Kentucky cases, it is sufficient to say they seem to be somewhat at variance with the decisions of the other states and of the United States Courts. But even in Kentucky there has been found no case relieving directors from the consequences of disregarding specific warnings that employees are open to suspicion, and it is submitted that, if the case at bar were before the Supreme Court of Kentucky, Edwin Dresser would be held responsible, and the Court would not have to overrule or qualify any of its decisions heretofore made.

The Various Defenses.

The defendants claimed: (1) That no conclusion that they were guilty of any negligence could properly be drawn from the primary facts proved or admitted. At the conclusion of the evidence hardly any of these primary facts were any longer in dispute. The question was not what had been proved, but what conclusions were to be drawn from proved facts. (2) That, the special master having found in their favor, his finding is not subject to review by the District Court which appointed him or by any appellate Court; and (3) they advanced certain special claims that they were justified in their inaction while the stealings were in progress by certain special facts or circumstances in the record or alleged to be deducible therefrom.

Receiver will take up first the matter of—

The Special Master's Report and Its Weight.

The United States Courts are reluctant to send cases to masters, but in some instances, and this was one, are practically compelled to adopt such a course. The

extent to which the report of a master to whom such a case is referred may be revised by the Court depends partly on general principles of law and partly on the wording of the decree appointing the master. In this case the decree was very carefully drawn (Record, p. 27), and expressly provided:

> "Any party to the suit shall have the right to a review and a determination by the court upon the evidence reported by the master of any finding of fact or conclusion of law made by the master. The master shall report to the court all the evidence bearing upon any question of fact which any party desires to be re-examined and found by the court, and such other portions of the evidence as may be material to any requests for rulings or other question of law which any party may desire to present to the court."

The matter of the finality of a master's report in federal equity practice is discussed with full references to the cases in Street's Federal Equity Practice, secs. 1506 to 1519, inclusive. This is the most complete and thorough discussion anywhere. There were a number of cases on the subject cited by the defendants in the District Court as supporting their claim and presumably relied upon in this Court. It is sufficient to say that in no one of the cases cited was the decree or rule anything like the decree in the present case. It is a fairly general principle that, where a master has been agreed upon who shall hear the case generally by the consent of all parties, his decision, aside from errors of law, has great weight, but it is not absolutely conclusive. This is upon the principle

that the parties have in effect agreed to allow his report such weight. There is no case where such a principle is applied where all the parties have reserved their full rights to a review and a re-examination by the Court of the facts in the case on all the evidence, and further have reserved their rights for a full review of all rulings which the master might make.

The four cases principally relied upon by the appellants are *Kimberly* v. *Arms,* 129 U.S. 512; *Davis* v. *Schwartz,* 155 U.S. 631; *Peterson* v. *Mettler,* 198 Fed. Rep. 938; *Hattiesburg Lumber Co.* v. *Herrick,* 212 Fed. Rep. 834. They do not fit the case at bar. In fact they sustain the plaintiff's position, which is that the special master's report is presumptively correct only, and may be set aside or disregarded by the District Court which appointed him, or the appellate Courts, if found to be inaccurate, contradictory, unwarranted by the evidence before him, or not in accordance with law. In the Kimberly case the Court says, the reference having been by consent, the findings are to be "taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise." And the rule to the special master in that case was less liberal on this question of a review and "re-examination" than is the rule to the special master in the case at bar.

The references to the legal weight given the report in the District Court and the Circuit Court of Appeals are found in the record, pages 177, 178, and 1648.

In the Hattiesburg Lumber Co. case (Fifth Circuit,

C.C.A.), cited by the defendants, the reference to the special master was by consent, and the Court, after a review of the question, said expressly that the master's *conclusions* on facts found were matter of law and subject to full review, and then proceeded to set aside a part of his report. This case seems a strong authority in plaintiff's favor.

In another case, *Ohio Valley Bank* v. *Mack*, 163 Fed. Rep. 155, Circuit Judge LURTON, subsequently of this Court, says:

> "If it [the finding of a bankruptcy referee or a special master] be a deduction from established facts the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee, but if the finding is based upon conflicting evidence involving questions of credibility and the referee has held the witnesses much greater weight naturally attaches to his conclusion," etc.

This Court frequently reaches different conclusions on facts found and reported by inferior Courts, and makes its orders accordingly. Every appellate Court does the same. Can it be seriously contended that the findings of a special master possess a finality which the findings of the district judge who appointed him do not possess? Ordinarily the stream does not rise above its source.

To repeat, at the present stage, as when the exceptions were argued in the District Court, the principal disputes regarding facts found by the master relate to

conclusions of fact, and not to the primary facts. On only one important question of what may be called primary fact did the receiver, appellee, particularly object to the finding of the master; namely, to that portion of his report where he found the directors made "other examinations" of the condition of the bank than those referred to on the minute book. In this matter the evidence was overwhelmingly to the contrary, and the master's finding was set aside by the presiding judge in the District Court (Record, p. 194).

Again, the rule of law giving a master's report greater weight in cases which have been unreservedly submitted applies only to cases where the entire case has been generally submitted to the master as to an independent tribunal, upon both law and fact, and the master (Record, p. 102) expressly says that he does not construe the rule as a general submission of the entire case to him, both as regards law and fact. He clearly anticipated the review which the case subsequently received.

If there is a certain sanctity to the report of the master, and if the facts found by him have indeed become final, as appellants seem to claim, it will be interesting to know what the Court is to do when the master has found on one important fact three different ways, and on very many important facts two different ways, in different parts of his report.

The matter of the report is taken up later, but at this point attention is called to page 32 of the record, where, seven lines from the bottom, the master finds that—

> "After Mr. Cutting resigned [the name "Bragg" is a clerical error; all agree he means "Cutting"], Coleman acted as both bookkeeper

and teller until Mr. Edward A. Paul was employed in November, 1907."

This makes Coleman bookkeeper and teller from October, 1905, to November, 1907, twenty-five months, and counsel have agreed such was the fact (Record, p. 1362).

Later (Record, p. 73) the master in his report finds that he was paying and receiving teller for about *eighteen* months, and in another place (Record, p. 53) he finds Coleman *had nothing to do with the actual handling of the cash.* And again (Record, p. 91), he refers to Coleman as a *mere bookkeeper, with apparently no opportunity to draw money from the bank, etc.* These findings are irreconcilable, yet they are all made as findings of fact by the master; and if his findings of fact are not subject to review, who is to make the selection as to which finding is to be adopted by the Court?

This question has been several times propounded in Court to the learned counsel for defendants, but never answered.

The Special Master's Report.

The ordinary presumption is that a master appointed by a Court of equity will conduct the case in an impartial manner and with a freedom from bias. Also, that when the evidence and arguments are completed he will prepare and file a report showing accurate and competent work. The handling of this case by the master is deficient in all these matters. Most of the criticisms which the receiver, appellee, had to make of the master's conduct of the case while the same was actu-

ally on trial were argued in the District Court, but were not before the Circuit Court of Appeals, inasmuch as the District Court sustained the exceptions and set aside substantially all the conclusions of the report. The receiver, appellee, therefore, filed no appeal to the Circuit Court of Appeals, but the exceptions filed by the receiver to the master's report (Record, pp. 103-160) indicate some of the receiver's just causes of complaint. And the grounds of complaint based on the report itself are discussed a little later in this brief.

Two things, however, as bearing on the question of the master's bias may be briefly stated:

The master found (Record, p. 90):

> "In regard to Mr. Earl [the cashier], there does not appear anything to show that he was incompetent, or that his work as an accountant showed lack of skill or ability.
>
> "He kept his books accurately, and in all his conduct was straightforward and open. . . .
>
> "The claim of incompetency rests upon the proposition that he should not have allowed Coleman to handle the clearing house envelope and checks enclosed therein without careful supervision, and that he personally should have looked at all the checks that came in every day; that it was negligence on his part to have left so important a duty to so young a man without keeping close watch of him and of the entries on his book."

This is by no means an accurate statement of receiver's claim on this point.

This finding that Earl was a competent cashier was

totally at variance with all the evidence, and Judge BINGHAM reached an entirely different conclusion (Record, p. 210). But whether Earl was or was not competent was recognized by all parties as an important fact, although whether legally the defendants were or were not responsible if he was incompetent was an entirely different question. Considerable evidence was offered to show that Earl was *not* competent (*e.g.*, Record, pp. 298, 299), which evidence was excluded on the ground that plaintiff's counsel admitted he could not bring home the particular pieces of evidence to any of the defendants. *Then, having excluded the evidence on that ground, the master went ahead and, without so stating, found as a material fact that Earl was competent* (Record, pp. 90, 1362).

Such action on the part of a master has been properly characterized by RUGG, C.J., in the Supreme Judicial Court of Massachusetts, as "in the nature of a finding after a refusal to hear evidence."

> *Randall* v. *Peerless Motor Car Co.*, 212 Mass., at page 371.

Another and more serious criticism of the master requires a statement of certain evidence and the master's treatment thereof:

The plaintiff introduced fifty-seven exhibits of the same general character, numbers 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 65, 66, 67, 68, 69, 70, 71, 72, and 73 (Record, pp. 1379-1407).

Exhibit 4 consisted of five papers:

(*a*) A check of Coleman on the National City Bank,

dated December 24, 1909, to the order of J. Thomas Reinhardt for $3500, with sundry endorsements, etc., upon the back.

(*b*) Reinhardt's check on the National Union Bank, Boston, to the order of Lockhart for $3000, bearing the same date and with various endorsements, showing that the check was cashed at the National Union Bank, Boston, on December 24, 1909.

(*c*) The large Clearing House slip bearing the same date and showing, as one item, the claims of the National Union Bank of Boston on the National City Bank of Cambridge, $3998.75 (Record, p. 1381).

(*d*) The small Clearing House slip which the National Union Bank had sent to the Clearing House with all its items against the National City Bank, and the total of said slip being $3998.75 (one of the items, Coleman's $3500 check, represented merely by the figures 3500).

(*e*) The check of the National City Bank of Cambridge drawn on the National Shawmut Bank, dated December 27, 1909 (the next business day after December 24, 1909), payable to the Boston Clearing House, for the sum of $5574.26.

The other exhibits, the numbers of which have just been given, were of the same character, though of course of different dates and amounts, except that in most cases the Coleman check had been destroyed by him.

These fifty-seven exhibits represented fifty-seven occasions on which Coleman had stolen money from the bank, the amounts varying from $1000 (the smallest) to $6000 (the largest). In every one of the fifty-seven the cash was obtained by Coleman through the stock-

brokerage office of J. Thomas Reinhardt, and in each instance Reinhardt deposited Coleman's check in the National Union Bank of Boston, from which, in each instance, it was returned to Cambridge for payment through the Boston Clearing House.

The receiver, relying on these exhibits, urged in argument before the master that, if the cashier or anybody had kept any watch on the clearing during this period, he would have been impressed with the somewhat remarkable fact that the National Union Bank of Boston, a comparatively small bank, on very many occasions had the largest claims which came through the Clearing House from Boston against the National City Bank. Also that, if the person making this examination and discovering this fact had been interested enough to follow it up by looking at the items, he would have found that the undue prominence of the National Union Bank was due to the fact that it was acting unconsciously as the siphon through which Coleman was robbing the National City Bank. The facts were indisputable. The argument had weight, although it was not perhaps of the first importance. The way the master dealt with it *is* important, having in mind the fact (Record, p. 1407) that it is agreed that on *fifty-three* of the fifty-six Clearing House exhibits now in existence the National Union Bank was *first* in the size of its demands on the National City Bank made through the Clearing House; that on *two occasions* it was *second* in the size of its demands; and that on *one* occasion it was *third* in the size of its demands.

One of the fifty-seven exhibits, No. 28, was lost prior to the time of the arguments before the master, so no argument can be made concerning that exhibit, al-

though it does appear from such facts as are in existence in the record that the size of the demands of the National Union Bank on that day tends to show the same situation, namely, that the National Union Bank had the largest claim.

That is, the plaintiff's argument was *absolutely supported by fifty-three of the fifty-six exhibits.* Two of the fifty-six exhibits were *partially* against the argument; one was *decidedly* against it. The master in his report (Record, pp. 41, 42) selected and appended *eleven* of these exhibits to his report, describing what they were, without giving the figures, and then, selecting Exhibit 13 (Record, p. 42), says that, according to that exhibit—

> "Ten banks in Boston received deposits of checks on the National City Bank which were sent through clearing, and that the First National and National Shawmut of Boston also received checks which they sent directly to the National City Bank, thus making twelve banks receiving checks for deposit, drawn by depositors on the National City Bank. It will be observed that while the amounts varied, there were two of the banks that received checks to amounts larger than the amounts received by the National Union Bank."

All of this was quite true. But the master selected Exhibit 13, *not* because it was first in chronological order, *not* because it was numerically first as the exhibits were introduced, *but because it was the only one of the fifty-six exhibits that revealed a situation such as he proceeded to describe.* He does not *say* he selected it "at random," *but he also does not say he selected it as*

the one of the fifty-six which was most strongly opposed to the plaintiff's argument, while fifty-three out of the fifty-six exhibits were in entire accord with that argument.

Then the master goes on to say (Record, p. 42):

> "Examination of the other exhibits referred to shows a similar situation on each day."

This is wholly untrue, even of the rest of the eleven exhibits which he selected out of the fifty-six, and if we take the entire fifty-six, which is the only fair way in considering an argument of this description, we see that the misstatement is indefensible.

Receiver, appellee, called to the attention of Judge Bingham the manner in which the master dealt with these fifty-six exhibits and what was revealed by them, not as necessarily decisive of the case, *but as being important for the Court to consider in determining what weight to give conclusions of the master.*

The District Court treated the subject as follows (Record, p. 206), after referring to the fact that Edwin Dresser himself signed some of the checks on the National Shawmut Bank, drawn to the order of the Clearing House:

> **"These checks were a part of the 56 exhibits presented in evidence as samples of the method pursued by Coleman in getting money out of the bank and show the slip of the National Union Bank and the Clearing House slip, from which it appears that the amount of the checks sent by the National Union Bank through the Clearing House was the largest of the Boston banks that cleared checks drawn on**

the National City Bank through the Clearing House in every instance except three, and in two of these it was the second, and in the other the third largest."

When the presiding judge accepted the plaintiff's argument in the matter and stated it concisely, he necessarily found that the statement quoted from the master's report (Record, p. 42)—"Examination of the other exhibits referred to shows a similar situation on each day"—was false.

No explanation or justification of this part of the master's report was attempted in the District Court or in the Circuit Court of Appeals.

THE MASTER'S REPORT TAKEN IN DETAIL—ITS OMISSIONS, CONTRADICTIONS, ERRORS, ETC.

As the facts in the case are, with very few exceptions, practically agreed on at the present time, and as the Court is able to reach its own conclusions on the law without the aid of the master, it is quite possible that no extended examination of that report will be necessary.

As the report, however, omits some important matters and contains many contradictions, errors, misstatements, statements so incomplete as to be misleading, and similar matters, it seems desirable to review the same briefly, so that, in the event of the Court giving it thorough study, the weight to give its conclusions may be the better determined.

Record, p. 29, paragraph 1, is correct, except the plaintiff has never claimed to recover from any of the defendants all of the defalcation. He has claimed

the right to recover so much of the defalcation as was due to the negligence of these defendants.

Paragraphs 2 and 3 are not criticised.

Record, p. 30, paragraph 1, calls to the Court's attention that the defendants apparently never, until September, 1909, noticed that anything was the matter with the bank, at which time almost $113,000 of the assets had disappeared, and the stealing had been going on two years and ten months.

Record, p. 30, paragraph 2. To some extent this paragraph raises the question as to whether the liability of the president of a bank, the executive head, is, in a matter of this kind, any heavier than the liability of those who are directors only. There seems to be no authoritative law on this question, although there are occasional intimations that the liability of the president is somewhat heavier.

Record, p. 30, last line and p. 31, first line. The master here uses the word "insolvent" to mean that its assets are less than its liabilities to its depositors. *Insolvency in the sense that, if the comptroller had known its condition, the bank would not have been allowed to continue business dated back to about May 1, 1908, when the surplus was exhausted and the capital impaired.* Also it follows from the findings regarding insolvency as made by the master that it was not until its capital and surplus were both gone that the defendants began to notice that anything was wrong; and even from that time they never did anything.

Record, p. 31, finding (2). Here the master finds that *from the middle of 1907* Coleman was at all times in actual default. This is contradicted by his special finding (Record, pp. 1455-1477), where he finds that

Coleman was in default at all times *from November 24, 1906.* And see the report (Record, p. 81), where the figures recited show the same thing.

Record, p. 31, findings (5) and (6). The words "somewhat critically" do not mean very much. As a matter of fact during much of the period mentioned anybody with any familiarity with the books of a bank who made a half hour's real examination would have discovered discrepancies.

Record, p. 32, seven lines from the bottom, the name "Bragg" should be "Cutting," a clerical error.

Record, p. 32, six lines from the bottom, although stating that Paul was employed in November, 1907, the master does not state in what capacity. Paul testified, however, and all parties agree, that it was as teller, both receiving and paying teller.

Record, p. 33, first two lines. There was no evidence whatever in the case that Coleman while messenger ever assisted in the keeping of the individual ledger (deposit ledger).

Record, p. 33, line 2. The Court will observe that Coleman *was made sole bookkeeper of the bank just before he was eighteen years of age, and remained such until the bank closed.*

Record, p. 33, line 11. The master says, "Mr. Edwin Dresser, the President, came to the bank every morning for an hour or two, went over the state of the accounts with the cashier, Mr. Earl, considered questions of discounting or purchasing of paper or other security for investment, and then went to his own place of business. In the afternoon he would return again for an hour, and from the cashier ascertain what had gone on during the day." This statement as to the

time spent by Mr. Edwin Dresser in the bank goes beyond the testimony in the case (Record, pp. 322, 323, 1165, 1166). The statement that Edwin Dresser "went over the state of the accounts with the cashier" does not refer in any way to the depositors' accounts. The testimony is that Mr. Dresser made certain inquiries regarding the amount of cash on hand, the notes which were going to mature, and which would probably be paid within the next week, etc., in order to find out how much cash there was available for the purchase of notes and investments, but he never "went over" the state of the *depositors'* accounts, and there is no claim that he did. The word "accounts" is, therefore, somewhat misleading.

Record, p. 36, nine lines from the top. The real fact is that the system of keeping the depositors' ledger is simplicity itself. It can be understood by anybody who looks at it two minutes. While there were many entries to be made, and therefore many chances for mistakes, the checking system provided between the depositors' ledger and the cashier's book was such as to lead to speedy detection of errors *if that checking system had been lived up to.*

Also, where Earl testified that it was a book which had "always puzzled the amateurs" (Record, p. 328), note that Coleman, not quite eighteen, promoted from the position of messenger, was certainly an amateur, and it was turned over to him to keep without any real supervision.

Record, p. 36, six lines from bottom. The master finds "it is a difficult book to follow." Counsel submits it is nothing of the kind (see sheet pasted to page 27 of this brief).

Record, p. 38, lines 11 and 12. The master refers to occasions when "the entries were few and for small amounts, as many of them were." He might correctly have stated *as at least nine tenths of them were,* for there were few large accounts in the bank, and the average number of entries on the average depositor's account was not very large—one, or at most two, a day. The "checks in detail" column occasionally had several entries in a single day on a single depositor's account. This was true of no other column, and not the rule even with this particular column.

Record, p. 38, middle. The master says "for the individual account there is no up and down column." With very rare exceptions all the adding which had to be done on any account was the addition of the items in the "checks in detail" column, and the figures set down in the "total checks" column were the addition of the items in the first-named column. The figures in the "checks in detail" column were certainly "up and down."

Record, p. 38, line 20. The master should also have stated that the balance columns also should be footed each day. Why he omitted this statement counsel is left to conjecture. Of course on days when balances were carried forward, to foot the balance columns meant to add the figures in them, on other days it meant to extend footings from the previous day's figures. It was not the least of Earl's shortcomings that he let long periods go by when Coleman was not required to foot his balance columns. Had defendants looked at the deposit ledger, they might have observed this fact.

Record, p. 38, sixteen lines from the bottom, para-

graph beginning "In daily practice." This paragraph and the next two down to and including the word "checks" in line 9 (Record, p. 39) seem to make it out that Coleman made the memoranda which were made in the bank upon the big Clearing House slips. As a matter of fact these were always in Earl's handwriting (Record, pp. 318, 1381).

Record, p. 39, line 8. The master says that Earl occasionally looked over the checks which came in from the Clearing House "to see who drew large checks." The evidence was not as strong as that (see Record, pp. 201, 303, 309, 318, 319). If he had called for the large checks with any frequency whatever, and insisted upon seeing them, Coleman would have been caught.

Record, p. 39, fourteen lines from the bottom, beginning with the words "under this system," through the rest of the page. The statement there made is absolutely false if it means (as it seems to) that there was a system of checking in the bank in which the teller had a part, etc. There was nothing of the kind. The teller's only interest in the bank was his cash. He started in the morning with a certain amount in his drawer to use in the payment of checks presented for payment. He was chargeable at the close of the day's business with what actual cash had been paid to him by depositors and was entitled to be credited with what actual cash he had paid over the counter. Then, if the correct balance was on hand, his day's work was ended. He did not charge himself in any way with the amounts represented by *checks deposited*, although such checks passed through his hands, nor did he have anything whatever to do with the money withdrawn from the bank through the Clearing House, which usually con-

siderably exceeded the money paid by him over the counter. So the statement that "when the end of the day's business came, the teller and cashier would . . . compare their figures as to both deposits and withdrawals because each had a record" is not correct. Nothing in the teller's work or in the records kept by him served in any way as a check on Coleman's work, and there is not a particle of evidence to any such effect. The District Court so found (Record, p. 185, and see Earl's testimony, p. 320).

In fact there was direct testimony otherwise (Record, p. 340, bottom), where Earl, after testifying to the cashier's ledger being a check on the depositors' ledger, etc., said, "There was no other method of checking between Coleman's deposit ledger and my book."

Record, p. 40, lines 7 and 8. The master says, "Coleman in the earlier part of his stealings was speculating," etc. Why he limits Coleman's speculations to the "earlier part of his stealings" is unknown. The evidence was uncontradicted that his speculations continued to a time only two weeks before the bank closed (Record, p. 185, bottom). His speculations began about the time his stealings began. He employed brokers in Boston, and kept accounts with them. In fact, he continued to speculate in stocks down to February 7, 1910, when his last stock speculation took place. The statement as made by the master is not of itself incorrect, but it is certainly highly misleading.

Record, p. 41, first five lines. This statement is incorrect, for the cashier himself made up these figures upon the large Clearing House slip, and his own handwriting appears on all those slips (Record, pp. 182, 303).

Record, p. 41, second paragraph, last line. The statement that Coleman's method of stealing through the Clearing House "required no confederate to act in collusion" is correct, if by "confederate" we understand a guilty confederate. His method did require a careless cashier and could not possibly have operated without one.

Record, p. 41, last two paragraphs, and Record, p. 42, first two paragraphs. This misrepresentation regarding the exhibits, and what they show, has been fully discussed in this brief, pages 117 to 122, inclusive.

Record, p. 42, after the paragraphs marked (1), (2), (3), and (4), and the paragraph beginning with the words "actual addition." Attention is called to the fact that, when the "total checks column" was wrong, the balance column was almost invariably wrong too.

The statement in the last paragraph of page 42 of the record is wholly incorrect as regards most of the large accounts of the bank for at least a year and a half before it closed.

Record, p. 43, first paragraph, first eight lines. When Coleman gave this testimony he was under cross-examination by Mr. Morse, and was asked to find the first false entry which he could without the use of any notes, while Mr. Morse timed him (see Record, pp. 536-545). This was at a time when the stealings were few and generally concealed in individual accounts. A year or two later, when the false entries were very abundant, the result would have been quite different. Questioning as regards such dates was judiciously omitted from the cross-examination. It is not to be inferred that Coleman in his testimony in any way

contradicted the figures of Mr. Fraser, either the totals or the items. The master omits to mention in his report the circumstances of Coleman's testifying as he did at this particular time.

Record, p. 43, paragraph 2, second sentence. The master says, "These false footings were for a time always made on one page of the individual ledger, page four, so that the figures on all the other pages of the folio were correct." And he goes on to state that "anyone making an examination of his book, without any suspicion of false entry, but simply running it over, would have had to add the columns on all the twelve or fourteen pages to have discovered the false footing, unless he happened to turn to page 4 by chance; that is, the chance of detection by one unsuspicious of anything wrong, but running over the books in a general way, was as one in twelve part of the time, and one in fourteen the rest of the time."

"Later on, as his stealings increased, false entries were made on various and, perhaps, all of the pages."

It would seem that one examining the book and starting in the natural way with page 1 would have found something wrong when he examined the fourth page, and that the statement made that, in substance, there was but one chance in twelve (or fourteen) of finding something wrong is true only in the event of the person making the examination doing his adding on every other page before going to page 4.

The master is discussing the period around March 14, 1907, when he says that Coleman's false footings "were for a time, *always* made on one page of the individual ledger, page 4, so that the figures on all the other pages of the folio were correct." But on this

very date, March 14, 1907, there was a false addition on page 11, as well as on page 4. And before and after this date there were false footings, and many of them, on other pages. See the special findings, pages 1455 *et seq.*, where we find false additions soon after he began his thefts, to wit, in 1907, January 2, on page 2; January 14, on page 6; January 15, on page 7; January 31, page 11; February 4, 5, 7, 11, 12, 14, and many other dates, page 11; and after March 14 we find false additions March 18, on pages 4 and 11; March 19, pages 4 and 11; April 16, we find page 10 with a false extension; April 30, we find page 6 with a false extension; and, to sum it up, while page 4 was especially favored by Coleman in this matter of false additions and extensions, page 11 has nearly as many of these false entries, and the other pages are by no means entirely free from his frauds even at this early date. And later, as the master himself says (Record, p. 43), "false entries were made on various and, perhaps, all of the pages." This situation long antedated the closing of the bank. For example, see the special findings in the record (p. 1503 *et seq.*) showing false additions of figures in 1908, in three or more "Balance" or "Check" columns, under dates of January 2, January 6, June 25, June 30, July 6, July 13, August 3, August 11; and if we turn to December, 1908 (Record, p. 1545), we find, on December 15, six balance columns out of fourteen contained false additions; on December 28, six balance columns out of fourteen and one deposit column; on January 4, 1909, nine balance columns out of fourteen; on January 26, 1909, five balance columns out of fourteen and three deposit columns; on February 25, ten balance columns out of fourteen;

on March 9, ten balance columns out of fourteen and one check column; and on March 22, ten balance columns out of fourteen and three check columns, etc.

Record, page 44. The master makes the astonishing statement, "Up to April 11, 1907, when he had stolen $11,900 in this way, the stealings had all been concealed by increasing the footing of the 'Total check' column and decreasing the footings of the balance column on page 4, *and in no other way.*"

Counsel has already shown that the last statement is utterly incorrect, and having in mind the words "*in no other way,*" calls attention to the special findings on page 1455 *et seq.*, where the master finds, in direct contradiction to the words just quoted, that Coleman, prior to April 11, 1907, made many false charges to depositors' accounts in order to conceal his stealings. In fact, his first thefts were concealed in that way.

Record, page 44, twelfth line *et seq.* The master makes another statement, equally wide of the facts, where he says that on May 1, 1907, Coleman "swept all the defalcations into one sum and concealed it by carrying forward the balance of Mr. Edwin Dresser, the president of the Bank, $17,000. less than it was. . . . *This was the first time that any individual account had been manipulated, or any false entry, other than making a false footing, had been made.*" This statement has already been shown to be false by the portion of this brief just preceding, and if we go into details, we find, prior to May 1, 1907, other accounts than the president's had been manipulated, each by numerous false entries, *e.g.*, the account of the Standard Action Company (Mr. Barber's company) on several occasions, and also the accounts of F. A.

Kennedy, Charles H. Smith, and Martha C. Smith (see, *e.g.*, Record, pp. 889, 894, 895, 896, 901, 902, 903).

Record, p. 44, paragraph beginning, "On May 23, 1907." This paragraph shows the interesting fact that on June 11, 1907, Mr. Dresser's balance appeared on the book on page 4 as $45,226.79—the correct figures; also that the total of all the balances on that page (4) of the depositors' ledger was put down at $43,603.74, *or about $1600 less than one of the items in the column which purported to be added* (Record, p. 905).

Record, p. 47, lines 6 to 11. The master says, "Presumably, the examiner would look at and test his books for a period of a few days before the examination," etc. There was no evidence that the examiner ever made a test of the accuracy of the depositors' ledger except for a single day, which usually, if not always, was the business day just preceding the examination (Record, pp. 1195, 1232). Same page, ten lines from the bottom, the master speaks of the deposits dropping, according to the depositors' ledger on June 29, 1909, $294,195.57. Of course, on that day the *true deposits* were that amount plus what Coleman had stolen up to that time, or about $88,000 additional.

Record, p. 47, beginning nine lines from the bottom: "From that time." The master says "from that time the decline was continuous;" he means the *apparent* decline. The real situation was that the deposits were increasing, and the use of the word "decline" without the use of the word "apparent" is misleading.

Record, pp. 49, 50, 51, 52, 53. *As bearing on the accuracy of and care with which the report has been prepared it is of interest to note that in no one of the seven tables are the figures correct.* For example,

the master finds that according to the figures of June 18 the bank gained $63.77 in its total deposits. As a matter of fact it lost $27.23. On June 26, according to his figures, the master finds the bank lost $6447.72. The correct subtraction shows that it lost $6510.88. There are several other errors in the June table, some of copying figures from the books, others of additions or subtractions.

In the July table, under date of July 2, the master put down figures showing that the bank apparently lost almost $7700, yet no figures whatever appear in the loss column. On July 10, according to the master's figures, the bank lost $13,079.02, whereas, on a correct subtraction, it lost $3084.02.

In the table for August there seems to be but one mistake in the figures, the total of the loss column being put down as $100,229.58, whereas it should be $100,239.58. In the August table the master shifts his columns, making his first column that of deposits.

In the table for September, under date of September 17, the master puts down the deposits as $22,926.08 and the checks as $15,437.12, and then puts in the gain column the figures $6488.96, whereas the correct figure is $7488.96.

In the table for October, 1909, after the figures for October 1, the report recites a loss for that day of $564.16. A correct subtraction will show the loss was $554.16.

On October 14 the master states the deposits as $32,571.90, and the checks as $18,405.41, and says the bank gained $4166.49. A correct subtraction would show it gained on that day $14,166.49.

On October 25 there is another mistake of subtraction, but only $5.

In the table for November, 1909, the report says that on November 5 the deposits were $17,336.93, and checks $22,531.24, and that the bank gained $5194.31. A correct subtraction would show that the bank lost that amount instead of gaining it.

In the December table the master recites the figures of December 3 as deposits $16,631.96, and the checks as $16,742.40, and says the bank on that day lost $1110.45. A correct subtraction shows a loss of $110.44.

On December 16 the report recites deposits of $8465.25, and checks of $21,433.88, and says the loss to the bank on that day was $2968.63. A correct subtraction shows it was $12,968.63.

On December 31 the report recites the deposits as $16,784.39 and the checks as $17,152.70, and states the loss to the bank on that day as $3368.31. A correct subtraction shows a loss of $368.31.

The totals of the tables are to some extent affected by these errors. There are a number of other mistakes in the tables, where, however, the amounts are trifling.

Record, p. 53, first paragraph. The report says:

> "Coleman had nothing to do with the actual handling of the cash or the securities."

The testimony is unquestioned, and counsel agreed that Coleman was paying and receiving teller of the bank from October, 1905, to November, 1907, during which time he began his thefts, and no explanation is given to show how a man could be paying teller and

receiving teller of a bank and still "have nothing to do with the actual handling of the cash."

The next statement on the same page reads:

> "When the figures were made up each day both the cashier's and Coleman's figures agreed and were correct as to actual cash resources, and as to the other resources of the bank . . ."

The rest of the sentence is meaningless.

Coleman had nothing to do with figuring the "actual cash resources" of the bank. He never, daily or otherwise, prepared any statements or made any figures regarding the "actual cash resources" or any other resources of the bank, or in any way checked up any of the resources with the cashier. All he had to do was to figure the liability of the bank to the depositors as shown by his deposit ledger. He had no duties as to the bank's balance in the National Shawmut Bank, Boston, or with its New York correspondent, and nothing to do (as the master finds) with the notes and securities.

Judge BINGHAM says, regarding the sentence criticized (Record, p. 192):

> "I do not understand what the master means when he says 'when the figures were made up on each day both Coleman's figures and the cashier's were correct as to the actual cash resources.'"

Record, p. 54, last six lines of second paragraph. The master, after reciting certain facts contained in his tables says that on some days in June, 1909, when there was a heavy excess of withdrawals over de-

posits, "if the cashier had been moved to examine the individual ledger and checks for the purpose of learning who was making the withdrawals, he would have found no evidence of anything wrong, for the entries were correctly made for those days and the checks would all have been found in the bank to correspond with the Clearing House slips." It is important to bear in mind that every check paid over the counter passed through the cashier's hands when he entered the same on his book, and must necessarily have been inspected by him. Also that the total of the checks paid over the counter, and thus passing through his hands, was in most cases much less than the total of the checks which came in and were paid through the Clearing House. For example, see (Record, p. 52) the table for November, 1909, and, assuming it to be correct, column two in that table states the total withdrawals from the bank by depositors on each of the business days in November, 1909. This includes both checks paid over the counter and checks paid through the Clearing House. Column three states the amount of the checks paid through the Clearing House. Further examination shows that on eighteen out of twenty-five business days in that month the payments through the Clearing House were larger than the payments over the counter, and an addition of the column shows that about $5000 was paid out through the Clearing House to $3000 paid out over the counter. Therefore, if the cashier was interested in the heavy withdrawals, the thing for him to do was to examine the Clearing House items, which must surely have resulted in immediate discovery of Coleman's frauds. The largest clearings as a rule came on days when one

or more of Coleman's checks came in to be paid. The quoted statement is true of certain days but it is not true of the majority of the days on which Coleman's stolen checks came in for payment. The argument is not made in terms in the master's report, but it is implied, that it was not negligent for the cashier to fail to discover anything wrong on days when the bank's loss in deposits was heavy and Coleman's stolen checks came in for payment, precisely as it was also not negligent for him to discover nothing wrong on days when the loss in deposits was not heavy and Coleman's stolen checks came in for payment; and also that there was no negligence on a day when there was a gain in deposits and Coleman's stolen checks came in for payment. In other words, whatever the situation on any given day as regards stealings and the loss or gain of the bank on total deposits, the cashier was in no instance to be considered as having neglected his duty.

These tables were prepared by the master himself, and, apparently, to justify precisely this theory, namely, that whatever the state of the deposits, the accounts, the apparent shrinkage of deposits as shown on the deposit ledger, the amounts of the stealings day by day, etc., in nothing which happened, and in nothing which could have happened so far as the accounts were concerned, is the cashier or are the directors chargeable with any negligence. This proposition does not appeal very strongly to one's reasoning powers, and apparently did not impress the District Court.

Record, p. 56, paragraph middle of page, beginning with the words "In considering these figures." There is no question that a bank's deposits fluctuate legitimately day by day. The receiver's point was that

the authorities of the bank should know something not only about the extent of the fluctuations, but the cause, if they are heavy, and should not have stopped with a little guessing based on unfounded and unwarranted premises, when a very slight real investigation was all that was necessary.

Record, p. 56, last paragraph, and Record, p. 57, first half of page. Of course the figures quoted as total deposits September 1, 1908, and September 1, 1909, are less than the true figures by somewhere near the amount of Coleman's total shortage on each date. The same is true as to the other figures regarding falling deposits. The deposits were apparently falling, but not really, and the statement, "After November 1, 1909, the decline was rapid," would be more accurate if the word "apparent" had been inserted.

Record, p. 57, paragraph beginning "There was evidence." Here the report recites that the directors considered the question of the apparent shrinkage, and goes on to state that they studied figures as to conditions in New York. Apparently they did not appreciate that the situation in New York was different from the situation in the rest of the country (Record, p. 1285, and newspaper clipping read into Record). The report goes on to say that they also examined "reports of rival institutions in Cambridge;" that they thought the savings department of a nearby trust company might have had an effect, etc.; and (Record, p. 58) "came to a conclusion as to the reasons in the falling off in their own deposits."

As previously stated in this brief, the report seems to consider that the directors' failure to make any examination of actual conditions in their own bank was in

some way made up for by long-distance studies, and guessing about nearby institutions.

No better comment on this part of the report can be made by counsel than was made by Judge BINGHAM, as follows:

> **"It seems inconceivable that men, who were aware that funds entrusted to their care were diminishing at an unprecedented rate, could be said to be exercising reasonable care in the performance of their duties by simply looking at the state of New York banks, as reported in the 'Boston Herald,' or the reports of the other banks in Cambridge showing the state of their deposits and not looking at the checks in their own bank to see who was drawing out the money and the amounts, or making any examination of the depositors' ledger" (Record, p. 202).**

Record, p. 58. The master says he does "not find as a matter of fact that the things they [the directors] considered were the real reason or that they were right in their conclusions," etc. He will not flatly find that they were wrong, although there is no question about it.

Record, p. 58, fifteen and sixteen lines from the bottom. The report says that the directors thought that a nearby trust company or companies were paying 3 per cent on deposits as against 2 per cent paid by the City Bank. This was another guess. The fact was subsequently agreed upon that nearby trust companies paid only 2 per cent on deposits subject to check, although they did pay a higher rate on deposits in the savings department, an entirely different proposition (Record, p. 1349).

Record, p. 58, four lines from the bottom. The report says, referring to this period in the fall of 1909, "The cash and securities were counted and examined and found to correspond with his [Earl's] reports."

There is no evidence that any of these defendants examined the cash or the securities in the fall of 1909. *It was admitted by counsel that the semiannual examination which should have taken place in the fall of 1909 was omitted.*

Record, p. 58, bottom. The report says, "the possibility of embezzlement or defalcation did not occur to them." But this was long after Cutting's warning that there was a thief in the bank, after Fillmore's warning to the same effect, after Coleman had been running about in his automobile for a considerable time, and after Lombard had given his warning to Earl, which had been repeated to Edwin Dresser.

Record, p. 59, lines 13 and 14. The report recites that "Many checks were presented at the counter each day." It might truthfully have been added that there were many other days when not over twenty or twenty-five checks would be paid by the teller at the counter.

Record, pp. 60, 61. The master recites the form of the receiver's requests for special findings regarding the figures, and, while he does find that the figures on the books are as stated in the requests, he seems to complain of the receiver for making the requests. He then says (Record, p. 61), "Taking from the book of requests one at random," etc. The dropped balance thus "taken at random" was only $20. This was May 1, 1909. Take the period from March 22, 1909, to May 11, 1909, the dropped balances were as follows: $1000, $50, $1000, $1000, $3, $1000, $900, $1000, $700, $2000, $1000, $90, $1000, $8000, $3000, $2000, $2000,

$5000, $2000, $2000, $2000, $8000, $300, $1 (correcting clerical error made the day before), $20 (the one selected "at random"), $3000, $1000, $1000. He says that he is asked to find as a fact that on May 1, 1909, there was a dropped balance of Olive A. Badger of $20. He makes the finding, but says:

> "In order to make it I was obliged to take page 1 of the folio that included the week beginning Wednesday, April 28th, and ending Tuesday, May 3rd."

Then he proceeds to recite what happened on April the 25th, although he clearly means April the 28th, the figure 25 being a clerical error. He speaks of "Tuesday," meaning "Thursday." He tells what happened on April 28 and April 29, when the entries were properly made, and then proceeds to tell what happened on April 30; also that on May 1 there was a drop in the balance of $20. *He did not have to go back to April 28 at all, for the transaction on which he was asked to make the special finding covered only April 30 and May 1.* Apparently he did unnecessary work, and, so far as the receiver can see, with no possible object other than to magnify difficulties. Yet he says he was "obliged" to do it.

Also (Record pp. 61, 62) he is asked to find a raised balance on the Henry Thayer & Company account on May 1, 1909. He goes back and tells us what the balance was at the end of the day's business on April 28, that certain transactions took place on April 29 and were correctly set down, then tells what happened on April 30, and finally tells how on May 1 there was a raised balance of $1000. He again speaks of April 29

as "Tuesday," when it should be "Thursday." He was not obliged to look at or recite anything concerning the entries on the deposit ledger for April 28, April 29, or what took place on April 30, beyond the statement of the balance to the credit of that account at the close of business on that day. In other words, while the master says that he did considerable work in the matter of verifying these two findings which he was requested to make, it also appears that more than half of what he says he did was absolutely unnecessary, and why he did it is a mystery.

Was it because, having found for the defendants, he wished to cover up to some extent the situation, and to make it appear much more difficult for them to have detected trouble on the deposit ledger than was the fact? It would almost seem so. Counsel for defendants have attempted no explanation.

Judge BINGHAM comments on this part of the report as follows (Record, p. 184):

> **"In the master's report it is said that in examining an individual depositor's account on the deposit ledger 'it had to be read across the page'. This would give the impression that to ascertain the state of a depositor's account on a particular day one had to read and compute the figures extending across the entire page; but the fact is that it would be necessary to look only at the 'Total Checks' column and the 'Deposits' column, which were right beside each other, and at the previous day's 'Balance' column to see whether the balance credited to the depositor for that day was correct; and the sums deposited and the checks withdrawn by a given depositor on any particular day were, as a rule, so**

few as to render the task of verifying the account for that day a very simple one."

Record, p. 62, middle paragraph. The master says:

> "The requests are all that I find either dropped balances, raised balances, or incorrect additions in the various columns."

This is not true, and it would seem, although the master has made the findings as to what is shown by the books as requested by the plaintiff, that he has not really even read them with any care. For the very first of these requests (Record, p. 1455) is that the master find false charges made to a depositor's account, and there are a number of requests of that character.

Record, bottom p. 62 and top of p. 63. The master makes the special findings as requested, and then argues that the total number of fraudulent entries, "while large, is, however, but a very small percentage of the total entries on the books," and he proceeds to figure that the proportion of errors and false entries to the total number of entries during the time from July 1, 1907, to February 21, 1910, is but 2½ to 1000.

This small proportion the report treats as not enough to worry about, although the auditor of the bank had warned it that a single error left uncorrected for a single day was dangerous. But the facts just stated by the master, while true, do not present the matter in a fair light, for a very large number of the entries were necessarily correct items of deposits made and of checks paid. But if one takes the total number of *footings of columns* and then finds the num-

ber of *false footings of columns,* the proportion of *false footings* to *total footings* is very large. There were many times when nearly all the footings of balance columns were, fraudulently, too large or too small, and when false footings of many other columns also occurred, and to get a minimum proportion as regards false entries it is absolutely necessary to add in the thousands of entries that must necessarily have been correct.

Also, if the percentage of fraudulent entries for the period running from the middle of 1908 to the close of the bank's business should be taken, it would be considerably larger than where one begins at the earlier date. For, as the stealings increased, the false entries increased, and the percentage of false entries to true entries increased.

If we take the period beginning January 1, 1909, again the percentage increases. The only way in which the special master could find a small percentage of errors as compared with true entries was by going back to a time near the beginning of the stealings and including all the entries of every class. This was the course followed, though misleading, and though its unfairness was called to his attention.

Record, p. 64, middle paragraph. The master says the personal deposit of Edwin Dresser ran from $35,000 to $50,000 all the time, and was an inactive one. This is incorrect. The account ran much higher and the balance due Mr. Dresser at the time the bank closed was $65,359.48, although his balance on the deposit ledger, as manipulated by Coleman, stood at a less figure.

Record, p. 65. Section 19 of the by-laws does not

read correctly. Attention has previously been called to this. After the word "Liabilities" in line 4 of this section of the by-law as printed should appear the words "with the balances."

Record, p. 66, bottom, and p. 67, top. It is of interest to note that on July 20, 1903, the directors, on the retirement of Mr. Davis, Earl's predecessor, voted "to make an examination of the money, notes, securities, and other property of the Bank," etc. Even as far back as 1903 they did not seem to realize that properly to examine the bank required a verification of the liabilities. The vote, however, became unimportant, because it was reconsidered, and the auditor, Mr. Wright, was appointed, who, in his examination, verified both assets and liabilities.

Record, p. 69, last two lines. The master finds, which is the fact, that the records of nearly all the directors' meetings simply recited that "the records of the last meeting were read and approved, and that no further business appearing, it was voted to adjourn." Usually, but not always, there appeared the names of the directors present, and the cashier always attested the record. It is claimed, and not controverted, that at each of these meetings the discount list for the previous week was read and approved, but the cashier did not note this fact. Certainly the records were not kept in proper shape, if we pay any attention to section 16 of the by-laws (Record, p. 65).

Record, p. 70, lines 9 and 10 from the bottom. The master finds that there were other examinations by the directors as a board, *i.e.*, examinations of the bank. (Record, p. 94). This has been commented upon as a finding wholly unwarranted by the evidence and set

aside by the District Court (pp. 61 to 66 of this brief).

Record, p. 71, lines 7 to 10. This statement is correct, but it was a matter never in controversy.

Record, pp. 71 and 72. *The report of the bank examiner to the comptroller, after each examination was made, was never shown to any of the defendants, and their only knowledge of its contents was based on inference.*

Record, p. 73, second paragraph, beginning "He further testified." This statement is not true. A large number of fraudulent entries could have been detected at the last four examinations of the bank by the bank examiners, for if they had simply run back individual accounts, they would speedily have come upon dropped balances and raised balances. At most examinations, if they had gone back two or three weeks, or even less, and examined the additions of the columns, they would have found false additions. They could not have discovered the entire shortage without calling in the pass-books, but that there was a large defalcation could have been discovered had the time at their disposal, dividing the work as they did, been sufficient. The testimony was that the time spent by an examiner on the deposit ledger was ordinarily a little over an hour (p. 52 of this brief).

Record, p. 73, last three lines. The report recites that Coleman was both teller and bookkeeper for a period of *about eighteen months*. Counsel agreed that it was the fact, and the report elsewhere states, that it was *twenty-five months* that he occupied these positions.

Record, p. 75, line 5. The report speaks of "Roaf" resigning in February, 1905. This is a mistake for

"Bragg." Roaf left the bank in May, 1904, as previously found. The report says, "When he [*i.e.*, Bragg] resigned, February, 1905, he asked Mr. Dresser to have the cash counted before he left, but it was not done." Mr. Bragg testified that when he asked Mr. Dresser to count the cash he (Bragg) had counted it and found it correct, that he wanted Mr. Dresser to prove it, and that the shortage occurred after that (Record, p. 875). Certainly the circumstances all pointed, if Bragg's testimony was correct, to Coleman having taken this $25.

Record, p. 77, lines 13 and 14. The report says from that time (October, 1905) until November, 1907, Coleman acted as both bookkeeper and teller. This is correct. The master might have added the significant words: "and shortages in the teller's cash ceased to be reported."

Record, p. 77, middle paragraph, beginning "I find as fact." Is it not reasonable to believe, from what we now know of the experience of the three tellers, that when Coleman had these chances to steal, not then being teller and having a teller's opportunities, and not then having devised the Clearing House method of stealing, he was the one responsible for these teller's shortages, which resulted in two of the tellers being discharged, and in the third resigning? While not actually proved, it is submitted that any other theory is difficult to sustain.

The master himself says (Record, p. 78) that the evidence is sufficient to create a strong suspicion that, in some instances, Coleman might have taken the money, etc. He finds himself, however, unable to go the whole distance and draw the obvious inferences.

Record, p. 77, seven lines from the bottom, after the word "November" should be inserted the figures "1907."

Record, p. 77, last seven lines. The report finds that Coleman had "worked out" his method of getting his checks cashed in Boston and sending them through the Clearing House before Paul became teller in November, 1907. It thus apears that Coleman, prior to November, 1907, being then only twenty-one years of age, was not only receiving teller, paying teller, and bookkeeper of the bank, but was also managing the clearings to the extent that he was able to do his stealings through the Clearing House remittances.

Record, p. 78, beginning thirteen lines from the bottom. The master finds that Coleman at the bank was well behaved, etc., and that he was never criticized by any one in the bank because of anything in his conduct or bearing. Certainly it could hardly be expected that a bank clerk would be engaged in dissipation while in the bank, and these particular findings regarding his conduct in the bank do not amount to much on the issues of the case.

Record, p. 78, bottom. The report says that outside of banking hours Coleman's occupations were not known to officers of the bank. In view of the fact that he was paying teller, receiving teller, bookkeeper, and handling the clearings, and possessed of the keys giving access to the cash in the bank, it certainly seems as though a mild interest on the part of the directors regarding the life of the young man outside the bank would not have been impertinent.

Record, p. 78, bottom, and p. 79, top. The report takes up the matter of Coleman's automobile, and, al-

though his salary was never over $12 a week, although he paid $800 for his car, although he got it at a time when he had stolen large sums from the bank, still the master is unable to find that a dollar of stolen money went into the purchase of the car, and declines so to find. There is such a thing as unreasonable scepticism as well as unreasonable credulity.

Record, p. 79, paragraph beginning line 9. From this paragraph it appears that the only testimony showing how Coleman got his automobile came from him. As all the directors (except Richardson) knew he had an automobile, it follows that all the evidence regarding their knowledge of his ownership of the same is what he stated, and they accepted.

Record, p. 79, paragraph beginning thirteen lines from the bottom, "I cannot," etc. *Here is an extraordinary misstatement. The master says he cannot and does not find that whatever Coleman did in the automobile business was the cause of his stealings, or that his stealings went into the business or had anything to do with it. But he has found Fraser's testimony regarding the details of the shortages to be correct (Record, p. 59), and Fraser testified that false credits were given by Coleman to the Kissel Kar Company, and the money drawn out by that company on many occasions.* See Record, p. 1019, where the balance of the Kissel Kar Company was extended at a figure $700 too much and the shortage increased by that amount; Record, p. 1020, where the balance was extended at a figure $1000 too much and the shortage increased by that amount; Record, pp. 1027-1028, where a deposit of $206, apparently fictitious, was given that company and the shortage increased by that amount; Record,

p. 1028, where the balance was extended at a figure $1000 too much and the shortage increased by that amount; Record, p. 1029, where the balance was extended at a figure $400 too much and the shortage increased by that amount; Record, p. 1031, where the balance was extended at a figure $1000 too much and the shortage increased by that amount; Record, p. 1035, where the balance was extended by two figures of $1000 each and the shortage increased by $2000; Record, p. 1044, where the balance was extended at a figure $1000 too much and the shortage increased by that amount; Record, p. 1046, where the balance was extended at a figure $200 too much and the shortage increased by that amount; Record, p. 1048, where the balance was extended at a figure $1000 too much and the shortage increased by that amount; Record, p. 1062, where the balance was extended at a figure $1000 too much and the shortage increased by that amount; Record, p. 1066, where the balance was extended at a figure $1000 too much and the shortage increased by that amount; Record, p. 1072, where the balance was extended at a figure $1000 too much and the shortage increased by that amount; Record, p. 1081, where the balance was extended at a figure $700 too much and the shortage increased by that amount.

To summarize: by one fictitious deposit, and fourteen fraudulent raises, Coleman stole from the bank for the benefit of the Kissel Kar Company, according to the books of the bank, a total of $12,206.

Record, p. 80, lines 7-10. The report says Mr. Earl left the examination of the clearings "to the bookkeeper and messenger, whose duty it was to enter the checks on the deposit ledger." The messenger had

no such duty and never entered any checks upon the deposit ledger. Nor did he do anything in connection with the clearing except sorting checks, etc., under the direction of Coleman, so far as the evidence discloses (Record, p. 300).

Record, p. 80, line 14. The report says:

> "Mr. Gale, Mr. Barber, Mr. Richardson and Mr. Sumner Dresser, I find, upon their own testimony, *never knew anything about the detail in the Bank or made any inquiries about it.*" (Italics counsel's.)

The word "detail" evidently means the handling of the details of the bank's business. The sentence is incorrect when it refers to Mr. Richardson's testimony, for he never testified, and died while the case was pending.

Record, p. 80, paragraph beginning, just below the middle of the page, with the words "I find that." The report says, referring to Richardson:

> "He was urged by Mr. Dresser to accept the election [as a director], with the assurance that he would not be called upon to attend meetings; . . . that Richardson accepted the election, but was never active in the affairs of the Bank, in the Bank, and gave little or no time to the direct management or supervision of its affairs, but was accustomed to consult with Mr. Dresser, and perhaps other directors in Boston, in regard to the business of the Bank."

This certainly was a negligent act on the part of the

president, urging a man to become a director, and telling him that he need not attend meetings, etc.

As regards Richardson, there is no law that a dummy director is any less liable than a real director. It is true the stockholders choose the directors, but there is nothing to show that the stockholders knew of the assurances given Richardson to persuade him to become a director, and certainly nothing to show that the depositors (whom the receiver also represents) had ever acquiesced in Richardson's becoming a director knowing that he could give little or no time to the service of the bank. The evidence also that Richardson was accustomed to consult with Mr. Dresser "and perhaps other directors" in Boston in regard to the business of the bank is almost *nil*. It is not likely that a man of Mr. Dresser's dominating personality, with a director who entered the service of the bank as Richardson did, would consider it necessary to hunt him up in Boston and consult him on bank matters. The testimony on which that finding is based is very slight. Such as it is, it appears in the record, pp. 1220-1223.

Record, pp. 81, 82. Here again the special master gets his figures wrong, although the total of the entire shortage is given correctly. For example, the report recites that in January, 1908, $600 was taken. If $600 is added to the total shortage at the end of December, 1907, $32,100, the result is $32,700, and the total of the shortage as appears in this table at the end of January, 1908, is given as $33,000. As a matter of fact $300, instead of $600, was taken in January, 1908. The figures regarding the shortage in this brief (pp. 32-33) are correct.

Record, p. 82, bottom, and p. 83, top. The master

does not state fully regarding the memoranda which Coleman made upon his books, but they were fairly numerous, and significant if defendants had looked at the ledger and noticed them (see, *e.g.*, Record, pp. 509-514, 553-554). Sometimes a double cross opposite a false entry; on a few occasions the words "do not list" against something that should not be down on the book; and sometimes figures in pencil beside particular accounts, to call attention to the amount which such accounts were short. There were others also, as testified to in detail by Fraser. These memoranda, while significant and of aid to the expert in his work, were not at all *necessary* to enable him to do his work and make up his figures. He could have found every false entry without their aid.

Record, p. 83, twelve lines from the bottom. The report speaks of fictitious credit entries. There were some of these entries, but the number was very small.

Record, p. 83, last paragraph, beginning with the words "Examination of his books." That paragraph is absolutely correct, but, as previously stated, the condition of affairs recited in that paragraph existed for less than a month in 1909, when Coleman did most of his stealing, and did not exist in 1907 or 1908 more than one fifth of the time, *and this fact is not stated.*

Record, p. 84, lines 6 and 7. The master finds—

> "The use of pencil instead of ink is not sufficient foundation to sustain a charge of negligence on the part of the directors."

This is a straw man put up to be knocked down. Counsel made no claim it was.

Record, p. 84, last line. The master says, referring

to Coleman, "he sold some three or four cars for which he received a commission," etc. There was no testimony offered which shows that Coleman ever sold more than three cars, and the Court finds (Record, p. 203) that three cars were all he sold.

Record, p. 85, Campbell's testimony. A fair summary of this is that at least one citizen of Cambridge was commenting on the fact of the bank's bookkeeper, on small salary, running an automobile, and was making his comments to the president some time before the bank closed.

Record, pp. 86-88, Mr. Fillmore's testimony. This has been fully argued. The statement of what took place is not complete, as has been previously called to the Court's attention in this brief on pages 68 to 71. The most important omission is on page 88, where, reciting the conversation that followed the letter (latter part of October, 1908), Mr. Fillmore stated:

> "*I told him* [*Edwin Dresser*] *that it was very evident there was a thief in the Bank.*"

This statement does *not* appear in the report, although the master finds (Record, p. 88) that Fillmore is a man of standing and responsibility, *and had the conversation with Edwin Dresser as testified to.*

Record, pp. 88, 89, Bullard's testimony. In giving the account of Mr. Bullard's testimony the master omits the important fact that Mr. Barber, when Mr. Bullard had the conversation testified to, showed no curiosity, or at least did not have curiosity enough to ask who was the "officer" referred to as "frequenting bucket shops in Boston and evidently living pretty fast" (Record, p. 207).

Record, p. 89, Rowe's testimony. The report does not mention that the important part of Rowe's testimony was excluded, and the exclusion was one of the exceptions which the plaintiff took to the report. What the excluded testimony was, however, appears in plaintiff's exception No. 102 (Record, p. 155). And it was after he had excluded this testimony that the master found as a material fact that Earl was a competent man and free from any negligence in attending to his duties in the bank.

Record, p. 89, Lombard's testimony. The way the cashier became satisfied there was nothing in what Lombard told him may be compared with the case of a boy who plays truant from school, writes his own excuse, and when giving it to the teacher states that he wrote it.

Record, p. 90, middle paragraph. The report says:

> "So far as Coleman's incompetency as a bookkeeper goes, the claim of incompetency rests principally on the fact of his age."

No such claim was ever made. Coleman, *under reasonable supervision*, might have been a fairly competent bookkeeper, but it appears, unquestioned, that he made not less than 2793 erroneous entries on his deposit ledger in the period in question (Record, p. 1121); 2571 of these were detectable on his deposit ledger alone, 222 detectable by a comparison of the deposit ledger with the cashier's ledger. No doubt fully half of these erroneous entries were honest mistakes. The number of erroneous entries would be duplicated several times over if the blanks, which are equivalent to ditto marks, should be counted. The

statement that Coleman, as a bookkeeper, was "of more than average skill and brightness" is certainly an unwarranted reflection on the average bookkeeper of the average bank.

Record, p. 90. The statement as regards Mr. Earl, "There does not appear anything to show that he was incompetent," is not at all in accord with all the evidence. This has been gone into at some length. Judge BINGHAM correctly states the situation in the language quoted on pages 30 and 31 of this brief.

Record, p. 90. The report further says regarding Earl, "He kept his books accurately." Earl did keep his own books accurately in the sense that his additions and subtractions upon the same were correct, but *so far as his book showing the actual condition of the bank was concerned, it was out of the way $50,000 for months at a time; $100,000 for weeks at a time; and on many occasions over $200,000 out of the way, and this while the total deposits of the bank averaged a little over $400,000.*

And, although this is now admitted by all parties, the master considers that "He kept his books accurately."

Record, p. 90, the last nine lines. The claim of Earl's incompetency rests on far broader grounds than stated by the master. This has been pretty thoroughly discussed.

Record, p. 91, lines 9-12. The report says:

> "There was no way, apparently, by which a mere bookkeeper could draw money from the Bank or its depositories, except possibly by forgery, which would soon have been exposed."

The report ignores the express finding, which all now agree is true, that Coleman was not a "mere bookkeeper," but for two years and one month was paying teller and receiving teller as well as bookkeeper, and it was while this was the situation that the stealings represented in the final shortage began. And even if he had forged checks, his detection was not likely, as he could abstract and destroy any forged check that came in through the Clearing House and then proceed to cover up on his deposit ledger as he did in the case of his own fraudulent checks. As a matter of fact, however, he did not, so far as the evidence disclosed, forge any checks.

Record, p. 91, middle. The report says:

> "In the absence of anything indicating a change in Coleman's conduct, or anything to arouse suspicion of him, Mr. Earl, I find, had a right to rely upon him."

As heretofore stated, the evidence shows that many things occurred to indicate a change in Coleman's conduct, and many things to arouse suspicion of him. Some of these the report itself has recited, and still the words just quoted seem to indicate that there was no evidence of anything of the kind.

The master seemed to think that his findings regarding Earl's freedom from negligence might not appeal to the Court, for he says (Record, p. 91, paragraph a little below the middle of the page) that—

> "Whatever might or may be said as to Mr. Earl's negligence in allowing Coleman to handle Clearing House checks, I do not consider that the

directors were chargeable with any duty in the matter of making entries on the individual ledgers, or that they were bound to know about such entries, and I find that as a matter of fact they were not negligent in not knowing what entries were made."

The receiver never claimed that the directors were chargeable with knowledge of the entries on the individual ledger, but he did and does claim that they had some duty of supervision and examination; and particularly that the books were *opportunities* whereby at all times, and especially after the first year of the thefts, Coleman's misdoings could have been quickly detected had the directors chosen to use a little diligence and a little common sense.

Record, p. 91, bottom, and p. 92, top. The report reaches the weird conclusion that if Coleman had not given his testimony, it would have been difficult, if not almost impossible, to have discovered how the money was taken. That is, if Coleman had committed suicide when detected, the mystery would have been insoluble. It is hard to deal patiently with such a conclusion. The expert did not need Mr. Coleman's testimony on any single item, and the receiver did not rely on Coleman's unsupported testimony on any single item, although it was corroborative in numerous instances. Any auditor starting to make an examination of the bank to ascertain its condition after it had closed would have immediately found, as did Mr. Bullard and his clerk in half an hour, that there was a large shortage. He would at once have started to verify the Clearing House items (the Clearing House slips being preserved as a

part of the bank's records) (Record, pp. 302, 360, 361), and the method by which Coleman had made the most of his thefts would have quickly become apparent. An examination of the clearings would have promptly disclosed the remarkable prominence of the National Union Bank for about a year prior to the failure, and communicating with that bank would have shown the agency by which Coleman had got his checks cashed. The major part of the work, while consuming much time, would not have offered any great difficulties to a competent accountant.

Therefore the statement as made by the master is wholly unwarranted. *If true, it would indicate that, without the confession of the thief, this bank would have lost $310,143.02 and nobody could ever have found out how it had disappeared!*

Record, pp. 92, 93, have been sufficiently commented on in the earlier part of this brief.

Record, p. 94, middle, says that examinations made by committees of the board of directors, or by the board itself, were never carried to the extent of examining the individual ledger, and that section 19 of the by-laws does not seem to require it. Then the report goes on to say, referring to the directors:

> "Their examinations were for the purpose of ascertaining whether the resources of the Bank, as disclosed by the cashier's statement, were actually on hand."

That is correct, and on the two occasions when they examined the bank they may possibly have verified the resources, although the record makes it appear that they did this on but one occasion in the three years and

three months of Coleman's thefts, and had not done it for a number of years prior to that time.

Then the report goes on to say:

> "Their examination as to the liabilities would cover all obligations of the Bank for expenses, borrowed money, rents, etc. and also to depositors."

The report uses the words "would cover." If, instead of the words "would cover," the report said "*should have covered, but did not,*" that paragraph would be correct. As stated, it seems to mean very little.

Record, p. 94. The report says the cashier's statement as to the amount of deposits was accepted by the directors as correct, without examination or proving of the individual ledger. This is true, and is one of the things wherein the defendants were negligent. *Aside from special warnings, everything pointed to Earl as the probable cause of the defalcations, if there was any dishonesty in the bank. How could they be making an examination which would be any check on Earl if they accepted, on all occasions, his figures as regards liabilities?*

Record, pp. 94, 95. The report takes up the matter of Coleman's speculation in copper stocks, finds that he told Mr. Dresser on one occasion that he (Coleman) was going to buy or sell some copper stock, and that Mr. Dresser paid no further attention to the matter and made no inquiries, and did not inform any of the other directors. This brings the case clearly within *Preston* v. *Prather*, heretofore referred to.

The report then goes on to argue, paying no attention to Lockhart's testimony (Record, pp. 864, 865),

that Coleman's remarks regarding copper stock amounted to nothing so far as ground for basing any charge of negligence is concerned. The argument is directly opposed to the reasoning of the Court in *Preston* v. *Prather*.

Record, p. 96, middle. The report again states, regarding Coleman, "*He was not intrusted with the handling of any money,*" and refers to "*the apparent impossibility of his being able to steal.*" As he was paying and receiving teller, and actually handling money daily during twenty-five months, and the master has so found, and was able to go to his bookkeeper's ledger and conceal thereon whatever money he took, these statements seem somewhat difficult to reconcile with other portions of the report.

Record, pp. 96, 97. The remainder of these pages is an argument that, no matter what happened at any time, the defendants must not be held liable, and has been covered by what has been heretofore said, except that after reading the last paragraph on page 96 and the first paragraph on page 97 it appears plain that the master took no stock in the rules of law laid down in *Rankin* v. *Cooper*, which had been expressly called to his attention.

Record, p. 97, last two paragraphs. The master says, in spite of the steady decline in the bank after September 1, 1909, and great daily fluctuations, he still considers the directors were not negligent. This was after many of the special warnings. And he then says:

> "The directors were still entitled to rely upon the cashier in the absence of anything that ought

to have aroused suspicion of *him.*" (Italics counsel's.)

This is an extraordinary proposition, to wit, that any director could receive personal warnings regarding Coleman's conduct, as Edwin Dresser did, and could, as Edwin Dresser did with the Fillmore warnings, neglect to pass these warnings on to the subordinate, the cashier, and could at all times remain quiescent so far as doing anything was concerned, *unless he had reason to be suspicious of the cashier.* Surely the employment of a cashier in a bank does not relieve the directors from obligations to heed warnings regarding other employees of the bank. No Court ever made such a preposterous ruling. Counsel for the defendants never made any such claim. Yet that precise proposition is laid down apparently as a ruling of law.

Record, p. 98. The master says:

> "I cannot find it was negligent in Mr. Gale to go abroad either on business or for pleasure."

Receiver never claimed it was.

Record, p. 100, last three lines. The master finds—

> "For a considerable time prior to the Bank's closing Coleman did not carry out his totals, and an examination of his ledger would have shown that fact."

But even though making this specific finding, he does not in any way find that Earl was negligent in his supervision.

It is confidently submitted that this Court will, after a full examination of the special master's report, reach

the conclusion which the District Court did—that *on the disputed questions* his findings and conclusions possess very little value.

The special master's ideas on matters of evidence were at times peculiar, to say the least. A somewhat amusing instance of this is found in Exhibit 145 (Record, pp. 1451, 1452), which consists of pictures of the interior and exterior of the building of the Harvard Trust Company of Cambridge. These works of art were offered in evidence by the defendants while Sumner Dresser was upon the witness stand (Record, p. 1301), and in support of his testimony that the directors *thought* nearby trust companies were getting some of the deposits. It is now admitted that the bank was *not* losing deposits to the Harvard Trust Company, nor to any other bank or trust company; that its deposits on the whole were gaining (Record, p. 201). The special master admitted these pictures, against objection, apparently on the ground that, if the bank *had* been losing deposits, it *might have been* losing them to the Harvard Trust Company, because the Harvard Trust Company had a handsome building, and that therefore it *might* be important, in passing on the question of the negligence of the defendants, to see how handsome a building the Harvard Trust Company had. On the same principle, if the Harvard Trust Company had employed a handsome receiving teller, his photograph would have been admissible, because, if the National City Bank *had* been losing deposits, the personal pulchritude of the receiving teller of the Harvard Trust Company *might* have been what was helping the Trust Company to get the deposits away from the National City Bank.

Two things are considered by every master or Court in admitting evidence: (1) Does it have probative force? (2) Is there any rule of law which prevents its being admissible? And the special master who admitted Exhibit 145 against objection (Record, pp. 146, 147) undoubtedly regarded it as having probative force. The District Court appparently did not concur in that view.

The other picture (Record, p. 1453), Exhibit 146, offered in evidence by the plaintiff, stands upon a very different ground. The defendant Sumner Dresser, in endeavoring to account for the apparent loss of the deposits—which his bank was not losing—adduced, as another reason, that "The bank was a very unpretentious store, in a very much older building on the outskirts of the business district," that is, of Cambridge (Record, p. 1301). Receiver's counsel, on cross-examination, offered a photograph of the National City Bank building, which he happened to have in his possession, and made the witness admit that the building was on the corner of Massachusetts Avenue and Inman Street, Cambridge; that it was directly opposite the City Hall, with its ample grounds, and that another banking institution had taken the quarters since the City Bank closed (Record, p. 1327). And Exhibit 146 was introduced to show that the National City Bank possessed a handsome, modern building in an attractive location, and that the direct testimony of the witness quoted above was not true.

Special Claims Made by the Defendants.

1. The defendants claim, in substance, that the method by which Coleman stole most of the money was

so surpassingly novel and ingenious as to absolve them from all blame. Receiver quotes a sentence from the brief filed in the Circuit Court of Appeals by counsel for the defendant Barber: "The whole evidence shows that he [Coleman] had a gift for crime and the successful concealment of it, amounting to genius."

Even if Coleman's method of stealing had been one of such an ingenious nature that it was impossible, or almost impossible, to detect, there would be nothing in this claim. For the examination of the bank's condition which should have occasionally been made would necessarily have disclosed the exact situation of affairs. Nobody questions that. And Coleman's method was novel only in part. He began his stealings by pocketing cash while he was acting as receiving any paying teller (see p. 20 of this brief). For tellers to steal from the cash they are handling is not novel. The only real novelty about his thefts was that at a later time (1907) he got his checks cashed by the Clearing House method, so called, and this was a novelty simply and solely because the negligence of the cashier in turning over the handling of the Clearing House envelope to a clerk without supervision was so extreme that no cashier before or since, so far as the evidence in this case shows and so far as the books show, ever thought of doing such a thing. *Novelty in his method of stealing is no defense, for, however he got the actual cash out of the bank, he was compelled at once to make many false entries on his deposit ledger, the "easily manipulated book," as Earl calls it* (Record, pp. 345, 346). During the great bulk of the time after his stealings had reached a substantial amount—frequently before January 1, 1908, and with increasing

frequency thereafter—there were numerous false additions and errors on the deposit ledger, and from January 1, 1908, there were also large discrepancies between his ledger and the cashier's book which might have been readily detected (Record, pp. 1121, 1455, 1503, *et seq.*). This being so and the defendants having had full opportunity easily to detect his thieving for not less than two years and two months before the bank closed its doors, and having failed so to do, and having neglected even to attempt an examination into the bank's condition, how can the mere fact that some of the money went out of the bank in an unusual way operate to relieve them? It is not claimed that false entries on a deposit ledger are unique. False charges, false credits, false additions, and false subtractions are the common thing where a defalcation occurs in a bank. And the usual methods of detection would have sufficed. This is the book on which Wright had previously warned three of the five defendants in 1903 it was dangerous to let errors remain even a single day (Record, pp. 1436B, 1436D). The negligence on the defendants' part which resulted in loss to the bank was (aside from disregard of warnings) their negligence in looking after the internal management of the bank, failing to exercise any supervision thereof, failing to make inquiry if the cashier was attending to his duties, and utterly failing to pay any serious heed to the apparent heavy losses in the deposits, or to the bookkeeping department of the bank, in spite of the fact that the bank seemed to be rapidly going down hill. These forms of negligence were not occasional. They covered a long period, and there was nothing novel about them.

Moreover, regarding Coleman's alleged peculiar

skill as a bookkeeper and his alleged peculiar adroitness in manipulation of figures, the real facts are otherwise than as claimed by defendants. Fraser, the expert, testified that in the period of the thefts, of the 2793 actual false entries on the deposit ledgers, a large part were mistakes, as distinguished from fraudulent entries (Record, pp. 1121, 1138). Nearly all of these were errors which could have been discovered from an examination of the deposit ledger without referring to any other book. And, as shown by the form annexed to page 27 of this brief, one erroneous entry, whether fraudulent or not, was frequently multiplied many times by being carried forward, either as a blank (equivalent to ditto marks) or otherwise. Checks were often charged in the wrong accounts, and other ordinary bookkeeping mistakes made. Paul testified in his deposition on this subject. Among other things he says, referring to Coleman:

> "He made many errors and erasures; alterations and corrections were numerous on nearly every page" (Record, p. 1359).

No attempt was made to count the number of erasures.

And again, as bearing on Coleman's ingenuity and alleged skill in figures, Mr. Morse, counsel for three of the five defendants, had no special trouble in tripping Coleman in his testimony, although there seems to be little doubt that the witness was trying to testify to the truth when it came to figures.

For example (Record, pp. 724, 725), Mr. Morse, on cross-examination, got Coleman to testify that on a certain occasion the only thing that was false on Cole-

man's books was that from March 25, 1909 (when he had charged to individual accounts the entire amount of his stealings not previously charged off), the books continued with no other false entries down to June 15. Yet (see the master's special findings of fact, Record, pp. 1566-1581) on March 27, 29, 30, 31, and through the entire month of April, the entire month of May, and for the most of June down to the 15th, there was hardly a day when there were not false extensions, dropped balances, jumped balances, false additions, and other fraudulent entries, the entire number being very considerable. It is true a few of these entries, made the very last of May and the very first of June, may have been changes made after the bank examiner left, but this is not true of the entries in March, April, or the most of May.

Again (Record, p. 768), Coleman had been testifying as to what he did in the way of forcing his ledger at the time of the last examination by the bank examiner in December, 1909. He had testified that he made his ledger totals agree with the cashier's book, and Mr. Morse asked the following questions:

> "*Q.* How were you able to do that, that is to say, what record did you have that enabled you to know just how much you had to change? *A.* Why, I had Mr. Earl's ledger.
>
> "*Q.* Well, that showed the actual balance of deposits, did it? *A.* That showed the correct amount; yes, sir."

Now the principal complaint against Earl's book during the entire time of Coleman's stealings was the admitted fact that it did *not* show the actual balance of

deposits as Coleman here testified. It was short by the amount of Coleman's stealings, and at this particular time was over $200,000 out of the way! What Mr. Morse had in mind was that Earl's book showed at all times the actual *assets* of the bank, and the true liabilities *aside from deposits*, and Coleman, by taking Earl's figure of the deposits of the day before, could ascertain the figure with which he must make his own balances correspond. What Coleman testified to was entirely different, and Mr. Morse, had he decided to argue that Coleman was stupid and inaccurate in his testimony in this part of his examination, would have come pretty close to making his point.

On another occasion (Record, p. 796) Mr. Morse had Coleman do some adding, and he twice announced that certain figures added made $177,500.30. Mr. Bunker and Mr. Dean both added the column, disagreed with Coleman, and Coleman again went over his figures and admitted that he had made an error of $250.

Again (Record, pp. 555, 556, X-Qs. 2054, 2055), Mr. Morse got Coleman to say that down to the latter part of 1907 all his false entries were of one class, namely, an increase in the footings of the check columns. Yet during that entire period there is no question whatever, and the master has so found, that checks were fraudulently charged by Coleman to the accounts of substantial depositors, whose accounts were then carried short for considerable periods.

And again (Record, p. 587, bottom of the page), Mr. Morse got Coleman to say that up to April 30, 1907, false checks were not charged into any accounts, whereas as a fact the very first thefts discovered, November 24, 1906, were concealed by two amounts being fraud-

ulently charged into the account of the Standard Action Company.

It is not necessary to recite further mistakes made in his testimony.

This attempted exaltation of Coleman's skill as a manipulator of books and figures is quite out of accord with the facts. Nor do the defendants make much more of a point when they urge upon the Court their own general inefficiency and inability as an excuse for their not seeing or appreciating what was going on. That they were not in the least alert or vigilant in attending to their duties as directors must be admitted, and indeed the plaintiff's case is based on that fact. But, *except when acting as directors*, they appear to have been watchful and capable enough. Edwin Dresser was an able and prosperous business man, the head of a large corporation, experienced in financial affairs. Both Gale and Barber were men of business ability, connected with substantial concerns and apparently able to look after their own interests at all times outside of the bank. Richardson held a responsible position in a large Boston trust company, and there is no evidence that he was not entirely capable. Sumner Dresser occupied a clerical position with his father's company, the Standard Diary Company, and, so far as the evidence shows, was reasonably capable when outside the bank.

Coleman's alleged extraordinary skill shines chiefly because of the density of the background against which we see it; that is, the complete lack of watchfulness on the part of the cashier, the president, and the directors.

2. *Examinations by the Bank Examiners.* Defendants claim that the fact that a national bank examiner

examined the bank every six months and did not order it closed or call their attention to the fact that he had discovered trouble exonerates them. Most of the facts relating to the examinations by the bank examiners are recited in this brief (pp. 51-60, incl.; see, particularly, pp. 58-60, incl.). Some additional considerations from the receiver's standpoint against this defense are as follows: It is quite common to provide by law for the examination of corporations by government officials. Every insurance company has to submit to occasional examinations of this character. Sometimes these examinations by government officials amount to audits, but, so far as counsel can ascertain, no Court has ever ruled that the requirement of such examinations was *intended* to or does relieve the directors of the corporation examined from their own duty of reasonable diligence in looking out for its affairs. When such examinations are virtually audits the directors might be excused from having any private audit, but the semi-annual examination of a bank made by a national bank examiner is not an audit, or anything anywhere near an audit. No copy of the report of any examination was ever submitted to the president or any director of this bank (Record, p. 334). There never was any official approval of its condition. The most that can be said is that in the few hours occupied by the examiner —he received but $25 for each examination—neither of the examiners found Coleman's manipulations, he having dressed his books for their visits, the last time while the examiner was in the bank. They spent but a brief time on his deposit ledger—only an hour, or thereabouts—most of their time being occupied by verifying assets, . . . counting cash, examining loans,

collateral, etc. (For what took place see Record, pp. 310, 311, 591, 592, 1211.)

And three of the five defendants, namely Edwin Dresser, Sumner Dresser, and George W. Gale, who were directors at the time, knew from their experience with Wright, the expert accountant who made the last audit of the bank, in 1903, that it took a very considerable time to make an audit. The exact time consumed by Wright in his audit is left a little uncertain. The master states the facts regarding the auditor's employment and report in the record (pp. 66-69, incl.). He also refers (Record, pp. 75, 76, 89, 90) to some further work done by Mr. Wright in 1904. This work in 1904 was in connection with shortages which the teller Roaf found in his cash, and was not at all in the nature of an audit for 1904. He does not find the amount of time occupied by Mr. Wright in the 1903 audit. The District Court on all the testimony (p. 208), including Wright's (Record, pp. 846-850), finds the total time was "twelve to fourteen days." It may not have taken quite so long, but it certainly took not less than seven or eight days. Hence it necessarily follows that the three defendants just referred to must have known that the bank examiners' examinations were nothing like audits. They do not claim they were misled in any way (Record, p. 1281) regarding the scope of such examinations—merely, as receiver understands, that they understood everything was all right because they did not get any particular criticism from Washington as a result of each bank examiner's examination and report to the Comptroller. There was some testimony that on one occasion (possibly on more than one occasion) one of the examiners told some one in the bank that he

could give it a "clean bill of health," but he did not pretend to make this statement as an official communication.

It is worth observing that, although the defendants testified they noticed and were somewhat worried over the rapid drop which seemed to be taking place in the deposits in the fall of 1909, they did nothing at that time, or at any other time after 1903, toward having an audit or even a careful examination of the books, although they must have been aware in the summer and fall of 1909 that the bank examiner would not make his semi-annual examination until about December 1. The testimony was that one examiner came early in June and the other about December 1 of each year (Record, pp. 310, 1190, 1226), and the Court will notice that in September, 1909, Coleman stole $17,350, in October $47,277, and in November $51,847. The defendant Gale, when questioned regarding the condition of affairs on August 28, 1909, in the bank, admitted, referring to the apparent shrinkage in deposits, that the directors "had been alarmed a good while" (Record, p. 1263, bottom).

Yet, while they admit that the shrinkage was a sufficient shrinkage to "alarm" them "a good while before August 28, 1909," they took no steps toward a real investigation. From August 1, 1909, to the close of the bank Coleman stole $203,550.

In *Witters* v. *Sowles*, 32 Fed. Rep., p. 764, the Court says:

> "The Bank Examiner was not an officer or agent of the bank, and he had no authority, as such, to act for the bank in any manner, and could not bind it by any act done or undertaken in its

behalf. He represented a department of the government which supervises and controls the banks as to whether in certain cases they shall do business at all or not, but it does none for them, other than to wind up their affairs for their creditors."

The effect of an examination by officials of a department of the government as regards relieving a corporation or concern examined from liability for negligence has arisen in a case the reasoning of which the receiver submits is distinctly applicable in the case at bar. See—

O'Connor v. *Armour Packing Co.*, 158 Fed. Rep. 241.

In that case the plaintiff claimed he had contracted a disease from skinning the carcasses of cattle, which had been slaughtered by the defendant at one of its packing houses, said carcasses being infected with "charbon," and that the defendant was negligent in setting him to work on such carcasses, etc. One defense offered was that the carcasses in question had been duly examined by United States government inspectors as required by law and passed as free from disease. It was held that the defendant was not exonerated.

And in another late case, *Ketterer* v. *Armour & Co.*, 247 Fed. Rep. 921, decided in the Circuit Court of Appeals for the Second Circuit, in December, 1917, this matter of the effect of the statutes requiring government inspection of slaughtered cattle as relieving a defendant in a suit for negligence for selling diseased meat came up for discussion, and the Court said in substance that the United States statutes providing

for the inspection of meats, etc., were passed as "additional safeguards," and that a packer was not in any way relieved from the consequences of negligence in offering diseased meat for sale from the fact that the cattle or the meat thereof had been duly inspected and passed by the United States' inspectors.

Counsel have found no case where the point has been passed upon by this Court.

3. All the directors seemed to have considered as points in their favor the fact that they were not familiar with bank bookkeeping; that they did not ever examine the deposit ledger; and that they left everything in the way of the internal running of the bank solely to the cashier. The claim is made that directors of a national bank may properly leave to the cashier and his subordinates the general running of the bank, and that they are not responsible for losses incurred thereby. *This is not a correct statement of the law, for they are obliged, as the text-book references and the cases heretofore cited show, to exercise a reasonable supervision,* or, in other words, from time to time to take *some* steps to see that the cashier and the subordinates are doing their work honestly and properly, *and they took no such steps after the summer of 1903.* From the time of the Wright audit in that year to the time the bank closed, almost seven years, there was nothing whatever done by the defendants to satisfy themselves that Earl, the cashier, or any of the subordinate employees were doing their work in an honest and competent way. They assumed they were (see cross-examination of defendant Gale, Record, p. 1263):

> "*X-Q.* 171. That is, although you knew your deposits were falling off, you didn't make any in-

vestigation to find out how much they were falling off?

"*A.* We went as far as we could go. We inquired of the cashier, who was managing the bank.

"*X-Q.* 172. Weren't the directors managing the bank?

"*A.* No."

Also, see cross-examination of defendant Barber (Record, p. 1278), where he says he never took *any active part*, referring to the management of the bank.

Also see cross-examination of defendant Sumner Dresser (Record p. 1342), where he says in substance that the bank examination was the *only* check on Earl, the cashier, if he had been dishonest.

As a matter of fact he was personally honest. But, as previously stated, everything seemed to point, while the stealings were taking place, to Earl, the cashier, as the one most likely to be responsible for the heavy apparent shrinkages in defendants' showing month by month. Any reasonable examination into Earl's methods of conducting the business of the bank would have promptly revealed trouble, because it would have shown Earl's book and Coleman's deposit ledger did not agree.

4. The defendant Sumner Dresser took the witness stand for the defendants and testified at some length (Record, p. 1303 *et seq.*) to the general effect that in the fall of 1909, when the bank was apparently losing deposits very rapidly, he examined the published reports of the other national banks and trust companies in Cambridge, and also examined statements regarding the national banks in New York City, as published

in the Boston Herald, and noted that the deposits had shown a "marked tendency to decline from September or the last of August up to the first or middle of December;" that the National City Bank of New York carried in August $225,000,000 of deposits, which had shrunk in December to $150,000,000; also that he called these figures to the attention of the board. He further testified (Record, p. 1304) that he studied the condition of four other large banks in New York City and found somewhat similar conditions. He testified (Record, p. 1305) that during the fall of 1909 the deposits of the Central Trust Company and the Harvard Trust Company, nearby institutions, increased. What actually happened late in 1909 and very early in 1910 was that the banks in New York City did lose very heavily and the banks in other parts of the United States practically held their own. This appeared from the testimony of Mr. Barber, one of the defendants (Record, p. 1285), where he introduced into the record as a piece of evidence for the defendants a newspaper clipping, dated Washington, January 30, 1910. By this clipping it appears that deposits in the 7200 national banks of the United States between November 10, 1909, and January 7, 1910, decreased $191,566,488, and it also appeared that over $158,000,000 of this amount was lost by the 39 national banks of New York City, making the net loss of the national banks outside of New York City only $33,566,488. If there were 7200 national banks in the country and 39 in New York City, we have left 7161 banks outside of New York City, and if we divide the $33,566,488 among the 7161 banks outside of New York City, we find that each bank outside of New York City lost less than $5000—a mere

trifle. In other words, the testimony, which was probably too remote anyway to be admissible, tended to show that the defendants were *not* justified in their assumptions.

The newspaper clipping, by the way, is dated Washington, January 30, 1910. At this time the bank was in its last throes. It is almost an *ex post facto* exhibit.

If any defendant had looked at the slip in Exhibit 56, dated August 7, 1909 (Record, p. 1429), he would have seen that, according to that slip, his own bank on that date had deposits of nearly $342,000 (its true deposits were much larger), and, comparing this amount with the figures on the last slip for the year in that exhibit, December 24, 1909, when the deposits had apparently shrunk to a little over $140,000, he would have seen that his bank had lost a very much greater percentage of its deposits than had the banks in New York City regarding which the figures were given.

Sumner Dresser admitted that nothing in the way of any real investigation was made (Record, pp. 1334, 1335), and, when asked (Record, p. 1343) if he did not think the directors of the National City Bank of New York City had any idea where the $68,000,000 drawn out of that bank in a few months went to, admitted he did not know. He testified, referring to what he did (Record, p. 1343): "I was watching the interesting statements of the tendency of the great monetary centre of New York."

But the only method of finding out where the money was going was to examine the individual accounts in their own bank. This they never did. This watchfulness which he testified to was apparently considered seriously by the master as in some way, and to some

extent, not specified, operating as an excuse (Record, p. 57). But the admission of the testimony and the acceptance of the same by the master did not appeal very strongly to Judge BINGHAM in the District Court. He did not mince matters, but dealt with this part of the special master's report as follows (Record, p. 202):

> **"It seems inconceivable that men, who were aware that funds entrusted to their care were diminishing at an unprecedented rate, could be said to be exercising reasonable care in the performance of their duties by simply looking at the state of New York banks, as reported in the 'Boston Herald,' or the reports of the other banks in Cambridge showing the state of their deposits and not looking at the checks in their own bank to see who was drawing out the money and the amounts, or making any examination of the depositors' ledger."**

5. The defendants also claim that by-law 19 (p. 8 of this brief) is one which they might at will disregard, and that the by-law adds nothing to their common-law liability for negligence, if any such common-law liability whatever exists. The important part of this by-law, as viewed by the plaintiff, is the provision that the directors should make an examination every six months **"to examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the bank is in a sound and solvent condition; the result of which examination shall be reported to the Board at their next regu-**

lar meeting." The failure to make examinations either by a committee or by the entire board has been sufficiently discussed (pp. 61-66 of this brief). It is admitted that at none of the examinations of the bank by the directors were the assets and liabilities compared with the balances on the general ledger, either for the purpose of ascertaining whether or not the books were correctly kept or the bank in sound condition, or for any other purpose (Record, pp. 194, 195). Are the directors in any way liable for their disregard of the positive requirements of the by-law? Ordinarily the by-law of a corporation has all the force of a requirement of statute law as regards the directors and officers of a corporation, and that by-laws are not trivial things, are binding on both directors and stockholders of a corporation, and are not to be disregarded, see—

9 Corpus Juris, pp. 1112, 1113, and particularly notes, and cases cited; also—
7 Corpus Juris, pp. 586, 587, sections 214-218, incl., and notes, and cases cited.

The latter article discusses the particular question of by-laws of banks.

If the comparisons required by the by-law had been made, the discrepancies between the deposit ledger and the cashier's book would necessarily have been observed and Coleman's detection must have followed. This would have resulted in the bank's saving the money which the non-observance of the by-law enabled Coleman to steal.

Defendants claim that the by-law, as it was adopted by the board of directors when the bank was incor-

porated, and not by the stockholders, as is usually the case in business corporations, amounts to no more than, for example, would a by-law which provided the directors should hold their weekly meeting on Monday at 8 a.m. If they should all choose to meet at 10 a.m. no damage would be done, no wrong inflicted on anybody, and the disregard of the by-law would be immaterial. The District Court (Record, p. 195) treated the by-law merely as a piece of evidence. Defendants say: "The right of the directors of a national bank to pass by-laws is carefully confined by the act to a very narrow field." The particular section of the National Banking Act, sec. 5136, confers upon a national bank the power "to prescribe, by its Board of Directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted and the privileges granted to it by law, exercised and enjoyed." This is not "a very narrow field." Defendants emphasize the words "regulating the manner." Now, if the by-law in question is construed as merely "regulating the manner" in which the semi-annual examinations shall be made, nevertheless it remains true that, if the by-law had been observed, most of the loss would have been prevented; and the receiver submits that the Courts should not sanction the proposition that by-laws may be adopted by a national bank or any other corporation, and then almost totally ignored. The fact that the directors had the power by vote to alter or modify all or any of the by-laws is immaterial. The judges of a Court have the power to prescribe the rules

of practice for the Court, and to change the same from time to time. *But while a rule is in force and before it has been changed it is binding even on the judges who made it.*

15 Corpus Juris, 909, and cases cited.

It is not a case of the *construction* given the by-law by these directors over a long term of years. If a by-law, susceptible of two reasonable yet differing interpretations, had been given one interpretation by a board of directors for years, the Court would probably give that interpretation favorable consideration. But this is a case of ignoring the provisions of a by-law the provisions of which are open to only one interpretation. And the very act quoted above makes the by-laws the by-laws *of the bank*, and not of the directors. The bank may adopt by-laws through its directors, but, when adopted, they are the by-laws of the bank. The question as to whether any person dealing with a corporation, if he knows the provisions of the by-laws, is bound thereby has been decided both ways—

10 Cyc. 351, and cases cited—

but, as regards by-laws adopted by a stockholders' vote, it is settled that the directors are bound to the knowledge of such by-laws, and are to be held to the observance thereof.

It certainly is the law that stockholders are bound by the provisions of the by-laws of a corporation, or bank, and if the directors in a case like this are not so bound, then the situation of the stockholders seems an unfortunate one, being subject to the burdens of the by-laws, and not entitled to the benefits.

In *Cockrill* v. *Cooper*, 86 Fed. Rep. 13, the Court says:

> "The Directors of a bank, being agents of the corporation, are bound by the law of agency to act within the scope of the bank's charter and by-laws."

If this is a dictum, it seems to be a reasonable one.

The District Court treated the by-law "as a piece of evidence in the nature of an admission on the part of the directors as to what they regarded they were called upon to do in the performance of their duties in examining the bank" (Record, p. 195).

The Circuit Court of Appeals discusses the matter at considerable length (Record, p. 1652 *et seq.*) and apparently agrees with the claim of the defendants that the by-law of a national bank of itself amounts to very little.

Of course, the ordinary rule is that, where a man violates the law and another suffers as a result thereof, as stockholders and depositors did in this case, the sufferer has the right to hold the violator fully responsible. If this by-law is binding on the directors, the same rule should apply.

Parker v. *Barnard*, 135 Mass., at page 120.

Basis of the Decision in the District Court.

The District Court, after its full review of the master's report (Record, pp. 172-211), reaches the conclusion that all the defendants are liable for the amount of Coleman's thefts after September 30, 1907, to the close of the bank. This is on the ground that the semi-annual examinations of the bank, which, according to

custom, should have been made in March and September of each year, were for the most part omitted, and when the form of an examination was gone through (November 16, 1908, and March 30, 1909), were destitute of real value, inasmuch as no "comparisons" were made, and the deposit ledger never examined at all. In other words, the District Court says in substance that to let a full year go by without *any* examination (Record, pp. 194, 208, 209) into the condition of the bank's affairs was negligence for which the defendant should be held responsible.

In the Circuit Court of Appeals a somewhat bitter attack was made by the defendant Richardson on the so-called arbitrary conduct of the District Court in selecting special dates and holding that examinations should have been made on those dates or nearby dates. But the testimony, being that dividends were declared the last of March and September of each year and that the examinations were supposed to take place just prior to the declarations of the dividends (Record, pp. 324, 341, 342, 1307-1310, 1330), seems to make such criticism unwarranted, especially as it was not claimed that examinations were made on other dates. The District Court found other negligence, particularly on the part of Edwin Dresser, in ignoring specific warnings regarding Coleman from reliable sources, but these warnings came after September 30, 1907, and hence the liability to the bank incurred by disregard of the warnings was merged in the larger liability for the losses from September 30, 1907.

REVIEW OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The defendants' several appeals from the final decree of the District Court were argued before the Circuit Court of Appeals for the First Circuit the latter part of March, 1917, and the decision of that Court appears in the record, pages 1647 to 1665, inclusive, and the dissenting opinion of Judge BROWN of the District Court of Rhode Island, who sat with the Court of Appeals, pages 1666 to 1672, inclusive. These opinions were sent down March 5, 1918, the Circuit Court of Appeals having had the case under advisement for almost a year. It is necessary to call attention to only a few things therein. The Court says (Record, p. 1648), "Although the plaintiff Receiver recovers less than he claimed by the decree below, he has not appealed therefrom." This is not correct. The plaintiff receiver did not claim to hold the directors responsible for the entire shortage, but only for such portion thereof as might fairly be attributed to the defendants' negligence. This was the basis of the decree in the District Court.

The majority opinion then (Record, p. 1648) takes up the weight of the special master's report, and agrees with the plaintiff receiver that the report, both on general principles and by reason of the wording of the order sending the case to the special master, may be reviewed and set aside where justice requires. The dissenting opinion seems to reach the conclusion that the special master's report should be adopted (Record, p. 1672), both on general principles of law and also, apparently, because the dissenting judge had conceived a high opinion of the report itself. The plaintiff has

already pointed out that the report is not entitled to indiscriminate admiration (pp. 115-165 of this brief).

The majority opinion continues (Record, p. 1648 and thereafter) briefly to set out the situation in the bank, the method by which Coleman stole the money, and similar matters. This part of the opinion need not be reviewed. The Court says (Record, p. 1650) that the negligence of the defendant directors because of which the District Court has found them liable "consists wholly in their failure on or after September 30, 1907, to discover that Coleman was practicing his method of stealing the bank's funds and was so manipulating the entries on the depositors' ledger from time to time as to prevent their showing what he had done or was doing, except by resort to a more thorough and searching examination and checking of said entries than any which had ordinarily been made by the directors. By said method, as is undisputed, he successfully concealed his thefts, not only from the cashier, but also from the National Bank examiners at their semi-annual examinations of the bank and its books." And the opinion goes on to say (Record, p. 1651) that "if negligence is not chargeable to the Directors in respect of any of Coleman's stealings before September 30, 1907, it follows that they cannot be held responsible merely because of the deficiencies permitted by Earl to exist in the methods or routine followed in conducting the bank's regular operations or in recording them on its books, notwithstanding that it was by taking advantage of such deficiencies that Coleman was enabled to accomplish and conceal his stealings. They were entitled to rely, as they did, upon Earl to guard against any such deficiencies, and until some special necessity

for such action was brought to their attention they were under no duty to inquire or interfere independently of him."

This presents the essential difference between the views of the District Court and the views of the Circuit Court of Appeals. The former held in substance that directors are bound at reasonable intervals to have something in the nature of an audit or thorough examination made of the bank's affairs. The Circuit Court of Appeals holds in effect that they may intrust the routine management and keeping of the books of a bank to the cashier without supervision until some special necessity is called to their attention which requires them to "interfere." Prior to September 30, 1907, from which date the District Court holds the directors responsible, no audit or careful examination into the bank's affairs, except the hurried semi-annual examinations by the bank examiners, had been made for more than four years. The law on this question has been fully presented *ante*, and counsel on this point desire merely to call the Court's attention to the different positions taken by the District Court and by the Circuit Court of Appeals.

The majority opinion goes on to say (Record, p. 1653) that the District Court has held the defendants to "a standard of diligence more exacting than any heretofore applied in the case of National bank directors; nor can we regard the application of such rule justified by the circumstances here shown." Also that there would not necessarily have been a negligent breach of duty on the part of every director had they wholly disregarded article 19 of the by-laws, requiring examinations and stating how they should be made,

during the period of Coleman's thefts, "no special reason tending to forbid such omission being shown."

The rules of law relating to by-laws and their authority, etc., have been sufficiently discussed (pp. 180-184, this brief). As regards the remainder of the language just referred to the Court is asked to note that the District Court did not require that the directors be trained accountants or competent for even the simple effort necessary to detect serious irregularities on the deposit ledger. It did in effect require that they *either* have an occasional thorough examination by a competent man or that they occasionally should make a reasonably careful examination themselves. It did not allow them to avoid having an occasional independent examination "principally because it would cost something" (Record, p. 1259), and also to avoid making a reasonably careful examination themselves, excusing themselves on the ground that they "didn't know how."

As to the standard of diligence being more exacting than any heretofore applied in the case of national bank directors it is submitted that the case is a case of extreme negligence, greater negligence than appears in any of the other adjudicated cases, but falling well within the rules as to liability for negligence heretofore referred to in cases and authorities cited. A neglect is not sanctioned by the fact that it has existed a long time and has become a part of the routine.

> *Minor* v. *Mechanics Bank of Alexandria*, 1 Pet. (U.S.) 69-72.

The majority opinion then goes on (Record, pp. 1653-1657) to discuss the situation and to reach the conclusion that the directors were not negligent in failing to

make examinations or to have examinations made in the "absence of anything suggesting inquiry as to its necessity or importance." While this statement that in effect nothing had occurred to make it seem necessary or important to have an examination is true in the early part of Coleman's stealings (except for the warnings about Coleman, and his general conduct and free spending), it is not true as we come down to the time when the deposits began to fall off. The figures regarding total deposits from week to week are found in Exhibit 56 (Record, pp. 1408-1431, incl.). The heavy dropping off begins to be reflected unmistakably in the summer of 1909, and, as heretofore stated, the amount which Coleman stole during the summer and fall of 1909 and December, January, and February of 1910 was very large (see figures, pp. 33-34 of this brief). Prior to midsummer of 1909, while his thefts had been very substantial, they were not shown in an apparent shrinkage of deposits, owing to the fact that the number of depositors was increasing, and the amount of the deposits was increasing, neither of which facts do the directors seem to have known. This made the deposits appear comparatively steady, as Coleman took care of the increase and relieved the bank from the necessity of investing or otherwise caring for the same.

It is submitted that, when the deposits did begin to show a very marked shrinkage (August, 1909), the defendants did have something before them which should have "suggested inquiry," and that they should have done the only thing which under the circumstances could have amounted to anything—namely, made an investigation of some kind—which they did not do.

ren if the views of the Circuit Court of Appeals ther than those of the District Court are sound the rectors should all be held for the loss after the time nen they ought to have been on their guard and to ve made an investigation.

The majority opinion also refers (Record, p. 1655) the "subtlety" of Coleman's system "for the cover- g and concealing of his speculations and embezzle- ents." It seems to overlook the undisputed evidence at Coleman was entirely open about his speculations nd apparently made no attempt to conceal them (see ockhart's testimony, Record, pp. 862-867). Later n pp. 1658, 1659) this part of the opinion is somewhat odified by the Court as regards Edwin Dresser. But is submitted that there was no great subtlety in oleman's manipulations of books with false entries, lse additions, memoranda against various manipu- ted accounts, an occasional double cross, and memo- anda like "Do not list," against some fraudulent ems, etc.

(Record, p. 1655) The Court goes on to say that the xpert scrutinized the ledgers for six months, etc. Also nat it is not reasonable to find or assume that the direc- ors could have "discovered for themselves the impor- ant thing to be done and accomplished it with success." *The plaintiff deems it important, and has referred here- ofore to the matter, to call the Court's attention to the act that to discover the entire shortage and how each nd every theft was concealed was a difficult thing, and id require expert work of a high order. But to dis- over that there was a substantial shortage was at al- most all times, from early in 1908* (and often earlier), *n easy thing, and did not require an expert.* The

master has in effect so found in very many instances where he has made the special findings as requested by the plaintiff, which are found in the record, pages 1455-1641, inclusive. For example: Record, page 1497, where the master finds that "on the depositors' ledger under date of November 4, 1907, are found, made on or about said date, one dropped balance of Edwin Dresser, $20,000, three incorrect additions, balance column, page 4, $20,000; page 11, $3; page 12, $6000. All the foregoing open to detection on examination of the book by a person able to read, add and subtract without reference to any other book or paper. Also that on said date the correct additions of the columns exceeded the total deposits as shown on the general ledger by $9,000. Also that the footings of the balance columns on the deposit ledger, pages 1-14 inclusive, exceeded the amounts as shown on the general ledger by $20,000." All these entries were made by Coleman. The foregoing is merely a sample of these findings. On many other days the false entries, incorrect additions, jumped balances, dropped balances, etc., were much more numerous, and for the most part all that was necessary to detect them was the ability to read and to add and to subtract, provided that also the examiner knew the system of keeping the deposit ledger. This, as has been heretofore shown, could be mastered in five minutes by an intelligent boy ten years old. The Circuit Court of Appeals apparently assumes that these directors did not understand the method of keeping this book, although it does not go so far as to hold that they could not have understood it had they ever tried.

The majority opinion goes on (Record, p. 1656) to

mention that at times Coleman went back and made changes upon the figures of the previous days' business on his ledger and says (Record, p. 1656) "it cannot, therefore, be assumed as certain that the entries now found on the deposit ledger as of September 30, 1917 would have been found there as they now stand had the method of examination suggested by the District Court been undertaken by the Directors on that date. Nothing then known to the Directors tended to suggest to them the importance of making their examination without Coleman's knowledge." It was not the rule but rather an unusual thing for Coleman to make changes of the entries on previous days, though he did it at times, and the sentences just quoted amount to an argument that, if the directors had understood the system of keeping the deposit ledger and had determined to look it over, Coleman would have been sharp enough to fix everything ready for them by charging the amount of his shortage into individual accounts, and thereby make his deposit ledger correspond with the cashier's general ledger. Is it not equally reasonable to suppose that, if the defendants had occasionally looked with some care at his deposit ledger, Coleman never would have ventured to make false entries on it? It is quite likely that the immunity which his deposit ledger possessed as regards examination by others in the bank suggested or encouraged him to begin and to continue his thefts. Moreover, from the very start he was in the habit of concealing his thefts in part in the accounts of Mr. Barber's company (The Standard Action Company), of Edwin Dresser, of The Standard Diary Company (Edwin Dresser's company), and in the accounts of several

concerns with which Mr. Gale was connected. If these directors had examined his deposit ledger he could not have hoped to escape their finding out that the accounts in which they were personally interested were being carried at considerably less than their true figures. This would in all probability have meant prompt detection.

The Circuit Court of Appeals seems to assume that if the directors had decided to look at his deposit ledger they would have told him of such intention far enough ahead for him to have doctored the book for their benefit. But although the bank examiners' examinations had come at pretty definite intervals, and although Coleman could tell about when such examinations might be expected, there was no reason whatever for the directors to have made their examinations, if they made any, on definite dates and with Coleman forewarned. The natural way would have been for them to have met some afternoon at the close of the bank's business and required the production of his ledger, in which case he would have had no opportunity whatever to make preparations.

The majority opinion then goes on to take up the warnings given Edwin Dresser and disregarded by him (Record, p. 1657 *et seq.*) and to hold Edwin Dresser liable for the losses suffered by the bank from the date of his disregarding the express warnings of Mr. Fillmore, a depositor and a stockholder, which have already been discussed; also to discuss the question of the openness of Coleman's speculations in stocks (Record, p. 1658); and the Court reaches the conclusion that it is (Record, p. 1660) "unable to find reasonable excuse of Edwin Dresser's total disregard of what

Fillmore had said to him," etc. As plaintiff's counsel fully agree with that part of the opinion of the Circuit Court which covers this question of the warnings to Edwin Dresser, we do not find it necessary to comment or enlarge upon it.

The majority opinion goes on to consider that part of the District Court's finding which holds that all the directors are liable for the total amount stolen by Coleman after September, 1909 —$179,950. By this time there had occurred heavy Clearing House demands and, *apparently*, a heavy decline in the total deposits of the bank, and more or less "wondering" and discussing on the part of the directors (Record, p. 329). The Circuit Court of Appeals reaches the conclusion that no liability in this connection attaches to the other directors. But this matter has been so fully discussed in the earlier part of the brief that counsel do not find it necessary to make what would be in effect a re-argument. This Court is asked, however, to note that the majority opinion says (bottom p. 1663, top p. 1664) "that the conclusion of negligence must be clearly and unmistakably established in order to reject the findings of the Master." As repeatedly stated, the case was before the District Court and before the Circuit Court of Appeals almost wholly upon the *conclusions* of the master on facts agreed, or found by the master with the assent of all parties, and the plaintiff's criticism was directed to these conclusions. Now, if all the essential facts are found and were before the District Court and the Circuit Court of Appeals, and there is no question presented as to whether a witness was truthful, or whether his appear-

ance invited confidence, or anything of that kind, then the conclusions to be drawn are for the Court, and the fact that the master reached other conclusions is of little importance. Conclusions under these circumstances are in effect conlusions of law (p. 113 this brief).

The majority opinion says also (Record, p. 1664): "the only effectual step which these directors could have taken toward finding the true reason for the shrinkage noticed in the fall of 1909 would have been to order another complete audit made by competent experts." The Circuit Court of Appeals certainly did not appreciate the facts in this case when the presiding judge wrote that sentence. As previously stated, only a complete audit would have disclosed the exact situation, but a brief examination of the deposit ledger, or a brief comparison of the totals on the deposit ledger (when there were any totals on it) and the cashier's general ledger, or communicating with any one of scores of depositors whose accounts had been manipulated and who were apparently carrying much less than their ordinary balances, would have disclosed "the true reason for the shrinkage"—namely, that Coleman was stealing.

The dissenting opinion (Record, pp. 1666-1672) hardly seems to require extended comment. It argues at some length that the warnings which Edwin Dresser received ought not to count, ignoring some of the testimony and attempting to minimize some of the remainder.

One Kelher, a sporting man and gambler, managed, by means of a fraudulent faro game operated in New York City, to get into his hands a large por-

tion of the money which Coleman stole from the National City Bank. Keliher was subsequently indicted and convicted. Both the majority and the minority opinions make some reference to this matter, although it does not appear in the record in this case. Counsel for plaintiff receiver are unable to see how this matter was properly before the Court in the case at bar. The only reference to the Keliher case in the record is on page 670, where, on cross-examination, Coleman admitted that he testified in the criminal prosecution of Keliher, etc., and that the books of the bank were in evidence in those trials. Nothing appears regarding any faro game. But the Circuit Court of Appeals apparently took judicial notice of what had appeared in the Keliher case, although it was criminal and not civil litigation, and between the United States of America on one part and Keliher on the other, and was not a matter to which any of the parties in the present litigation can be considered privies. None of the counsel had referred to the Keliher case in their briefs. None of them had appeared in that case. It would seem as though the references in both the majority and minority opinions were to matters outside the present litigation, and had no pertinency.

Both the majority and minority opinions pay no attention to the important fact that Earl and his handling of matters within the bank, and looking after his subordinates, were never the subject of any investigation or supervision whatever from the time he came into the bank in the summer of 1903; that all the defendants relied upon him (if they relied on any one), even when the bank was going to pieces rapidly, and when, aside from special warnings, Earl was the one man more

than all others who was in a position to steal freely if he should see fit.

Referring to the majority opinion (Record, p. 1665), it is submitted that the warning given the defendant Barber, in which Mr. Bullard mentioned unfavorable rumors about one of the bank's officers (Record, pp. 207, 1271, 1279, 1280), might well have meant Earl, and if Mr. Barber had taken any steps whatever to investigate Earl's books, the trouble in the bank would have been discovered.

If the rule of law is that the entire internal management of a national bank, aside from the loans, may be left wholly to the cashier with no supervision by the board of directors and no checks upon him, except the occasional examination by a national bank examiner, copies of which examination are never seen by them, then the conclusions reached by the Circuit Court of Appeals on this part of the case may be sound. Otherwise they certainly are not. It is submitted that the average depositor in a national bank has always supposed that the duties of directors were more comprehensive than the Circuit Court of Appeals appears to have ruled.

Interest.

There remains only the question of interest. By the decree of the District Court dated February 1, 1916 (Record, pp. 172-173), the defendants were held liable to the receiver for the amount of Coleman's thefts from September 30, 1907, to the close of the bank, or $283,218.20. By the decree of the Circuit Court of Appeals the other defendants were held not liable, and

the estate of the deceased defendant, Edwin Dresser, was held liable for the amount of Coleman's thefts from December 1, 1908, to the close of the bank, or $264,088.02 (Record, p. 1665). The opinion of the Circuit Court of Appeals said nothing about interest. The opinion of that Court was dated March 5, 1918 (Record, p. 1647). Interest on the sum of $264,088.02 for which Edwin Dresser's estate was held liable from February 1, 1916, to March 5, 1918, is over $33,000. The receiver moved in the Circuit Court of Appeals that its decree of March 5, 1918, be amended by allowing this item of interest (Record, p. 1677). This motion was argued before the Circuit Court of Appeals, the same judges sitting, namely, Judge DODGE of the Circuit Court of Appeals and Judges ALDRICH and BROWN of the United States District Courts of New Hampshire and Rhode Island, respectively. The motion was denied, and a memorandum opinion by Judge ALDRICH appears in the record upon pages 1673 to 1675 (250 Fed. Rep. 552).

Rule 23 of this Court is as follows:

"Interest.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior

court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court."

Rule 30 of the Rules of the Circuit Court of Appeals for the First Circuit is identical.

If interest is to be allowed, there is no question that the Massachusetts rate is 6 per cent.

While the allowance or disallowance of interest in equity cases is a matter for the discretion of the Court, such discretion should be properly exercised, and, if justice requires it, interest should be allowed. And this entire litigation being before this Court for final settlement, with the question of interest duly raised, it will hardly be contended that this Court has not the power to take up and decide it with all the other matters in controversy. The receiver, in calling the Court's attention to Rule 23 of this Court and Rule 30 of the Circuit Court of Appeals, does not claim these rules alone settle the question, merely that they indicate the general policy of the Federal Courts.

Another point to be considered by the Court in this connection is that the $264,088.02 finally awarded the receiver against the estate of Edwin Dresser has remained in the hands of Edwin Dresser's administrator from the day of the final decree in the District Court (February 1, 1916) until the

present time, and has presumably earned interest. The question of fact as to whether this money has or has not earned interest is one which did not come before the Circuit Court of Appeals, as no question of interest arose until the decision of that Court had been handed down. The question of interest was then treated by that Court solely as a question of law, and the Court denied the application for the allowance of interest, irrespective of whether any interest had been earned or not by the property of the estate. If the point is of importance, counsel for the receiver are prepared at very short notice, if the case is sent back to the lower Court for that purpose, to produce evidence that interest has been earned during the entire time from February 1, 1916. Probably counsel for the estate of Edwin Dresser will not deny that such is the case.

> "The general rule in equity and in law is to allow simple interest by way of damages."
>
> *Arnold* v. *Maxwell*, 230 Mass. at page 445.

It is submitted that no equitable reason is shown on the facts, or set forth in the memorandum opinion on the subject, why interest should not be allowed in this case. The action, while equitable in form, is of a legal nature; in effect, a suit to recover from the defendants for negligence on their part whereby the depositors and stockholders of this bank (who are represented by the receiver) were damaged. Of course, interest could not be allowed until the damages should be liquidated at some figure, and the first time that this was done was when the decree of February 1, 1916, was entered.

By that decree, if it had stood unchanged, the liability of the defendants was fixed, as well as the amount of damages. After the case had come before the Circuit Court of Appeals that Court decided that the other defendants were not liable, but that the estate of Edwin Dresser had been properly adjudged liable, but for a slightly lesser sum than that awarded by the District Court. The reduction in the amount awarded from $283,218.20 to $264,088.02 is a reduction of less than 7 per cent. In figures the difference between the larger sum and the smaller sum is $19,130.18. This amount is only a little more than half the interest at 6 per cent on $264,088.02 during the time which elapsed between the decree of the District Court and the decree entered by the Circuit Court of Appeals, to say nothing of interest since accrued.

If the administrator had tendered the amount decreed by the District Court and the receiver had refused to accept the tender, then the equities in favor of the receiver's request to be allowed interest might be less. But the estate of Edwin Dresser, as matters stand, has doubtless been a large gainer by the delay, and this consideration is a strong one in favor of the receiver's claim. In *De La Rama* v. *De La Rama*, 241 U.S. 154, a divorce case which came to this Court from the Courts of the Philippine Islands, an award had been made the wife, and this Court cut down that award to a lesser sum, but allowed her interest on the reduced sum, saying, in an opinion by Mr. Justice HOLMES, "The husband had the use of the money meanwhile;" meaning, by "meanwhile," during the pendency of his appeal, in which

appeal he prevailed, but only to the extent of reducing the amount of the award.

The memorandum opinion seems to treat the decree which the Circuit Court of Appeals has made against the Edwin Dresser estate as in the nature of a brand new decree and a reversal of the old decree. But in reality it is, as regards the Edwin Dresser estate, a decree which is about 93 per cent an affirmance of the decree of the District Court. On one ground it is an express affirmance of the decree of the District Court. The decree as far as the Dresser estate is concerned should *not* be regarded as a reversal of the decree of the District Court. See *Kneeland* v. *American Loan & Trust Co.*, 138 U.S. 509. These were equity cases, and the Court said, the opinion being by Mr. Justice BREWER, and the situation being somewhat similar:

> "While the former decrees were in terms reversed, and the cases remanded for the entering of new decrees, yet the terms of the new decrees were specifically stated and in so far as the separate and distinct matters imposed in the former decree were ordered to be incorporated in the new, it is to be regarded as *pro tanto* an affirmance."

And it was held that interest was properly allowable on amounts which had been reduced, and from the time of an earlier decree.

There was a similar situation in a patent case. See *Illinois Central Railroad Company* v. *Turrill*, 110 U.S. 301, where interest was allowed on such part of the amount found due by the master as was affirmed by

this Court, such interest to be computed from the date of the filing of the master's original report, some years previously.

Another case on the point is *Oelwerke Teutonia* v. *Erlanger*, 248 U.S. 521. This was an admiralty case. The Court of first instance in the Philippines awarded a certain amount for salvage, namely, one half of the property salved. The Supreme Court of the Philippine Islands reduced this amount to 40 per cent of one item, and 20 per cent of another item. This was affirmed by the Supreme Court of the United States, Mr. Justice HOLMES writing the opinion, and interest was allowed on the reduced amount, the opinion saying:

> "We assume that the plaintiffs received a corresponding proportion of interest accruing on the fund."

A study of the memorandum opinion shows an apparent misapprehension on the part of the judge who wrote it. The claim against Edwin Dresser, if it had been a suit at law for negligence, would have contained two counts: first, a count for his general neglect of the bank's affairs, his lack of oversight, and his disregarding without any real investigation figures tending to show a heavy (apparent) shrinkage of deposits; and second, a count for his disregard of express warnings, notably the Fillmore warnings. The District Court would have found in plaintiffs' favor on both counts; the Circuit Court of Appeals principally on the second count, but partly also on the first count. The decree of the Circuit Court of Appeals actually handed down, as regards Edwin Dresser's estate, introduced no nov-

elties. It held that estate liable principally on the second ground, and, as the damages resulting from the negligence based on the second ground were a little less than the damages would have been on the first ground, found for the plaintiff in the lesser amount only.

There is nothing in the decisions cited in the memorandum opinion on the question of interest which is in any way in conflict with the plaintiff's position. Some of these decisions are simply that, where there is no order for interest made in a mandate, interest may not be allowed by a Court to which the mandate is sent. There is no question whatever on this point, and never has been.

In one other case where interest was refused, *United States* v. *North Carolina*, 136 U.S. 211, interest was denied on the ground that interest would not be allowed ordinarily in an action against a sovereign state. And in some of the other cases the observations of the Courts tend to support the plaintiff's position. It is respectfully submitted that the plaintiff is entitled to interest, and that the Circuit Court of Appeals erred in denying the same.

JURISDICTION.
FORM OF ACTION.
SURVIVORSHIP.

Counsel for receiver considered it unnecessary to discuss these points, for it has been conceded at all times by the defendants that the United States Courts have jurisdiction, that the procedure is in equity, and that the action survives. These matters are discussed

briefly, however, in the opinion of the District Court (Record, pp. 175, 176, 210, 211).

JOHN L. BATES, *Receiver,*
By his Attorneys,
FRANK N. NAY,
WILLIAM A. KNEELAND.

A chronology of the most important dates is appended.

ADDENDUM.

In the latter part of July, 1919, after the receiver's brief was in the printer's hands, the decision of this Court in *Bowerman* v. *Hamner* (decided June 9, 1919) was reported. This case strongly supports the receiver's contentions on several points which may be stated as follows:

1. That directors of a national bank are legally bound to diligently and honestly administer the affairs of their bank in accordance with the oaths required of them by law.

2. That a bank director may not avoid acquiring knowledge of his bank's affairs and abrogate his duty of supervision, except at his peril.

3. That the common-law requirement of diligence on the part of a director of a national bank is not abrogated by any statute provisions.

4. That a director who never makes, or causes to be made, any examination whatever of the books or papers of his bank to determine its condition and the way in which it is being conducted does not exercise ordinary care and prudence in the management of such bank.

5. That the by-laws of a national bank are not idle forms, but should be obeyed.

The case at bar is stronger in favor of the receiver than was the Bowerman case. In that case the weekly statements of condition of the bank did not, so far as the record of the case shows, reveal any startling apparent drop in the deposits, week by week, which drop amounted to a danger signal, and inquiry into the causes of which would have disclosed what was taking place. Also in that there were apparently no such

direct and explicit warnings from responsible sources as were given in the present case to the defendant Edwin Dresser, and, to a less extent, to the defendant Barber.

The loans of a bank, while peculiarly in the province of the board of directors, are nevertheless always, so far as their soundness is concerned, largely a matter of opinion.

A point of marked similarity in the two cases is the fact that the business of each bank was surrendered by the directors almost wholly to the president and cashier.

CHRONOLOGY OF SUNDRY IMPORTANT MATTERS.

1886	February 13	Coleman born.
1897	(About)	Fillmore's package left in bank.
1903	Previous to August	Earl helps Davis at bank.
1903	July 20	Directors vote to examine bank previous to departure of Davis, the cashier.
1903	July 27	Directors vote to have auditor examine bank, rescinding previous vote.
1903	July and August	Bank examined by Richard W. Wright, auditor.
1903	July 30	Earl elected cashier.
1903	August 3	Wright submits his report to Gale, who has been appointed a special committee in the matter.
1903	July or September	Coleman enters bank as messenger, age 17 years.
1903	(Fall) to May, 1904	Albert W. Roaf is paying and receiving teller of the bank.
1903	September 28	Vote of dividend by directors without any proviso leaving the matter to Edwin Dresser's discretion.
1904	January 4	Lockhart, age 15 years, enters bank as messenger.
1904	January (early)	Coleman promoted to be bookkeeper.
1904	January	Coleman given combination to main vault.
1904	Spring	Earl away sick for ten days and shortages occur in Roaf's cash on four or five days, amounting to $1172.85.

1904	Spring	Roaf goes before directors' meeting with the two Dressers and Gale present to explain the shortages. Later leaves the bank. (May.)
1904-1905	April-February	Charles L. Bragg paying and receiving teller, succeeding Roaf.
1904	June	Another shortage of $50 in cash sent to Shawmut Bank by Coleman as messenger—never explained.
1904	June and July	Wright makes some further examination in connection with audit of previous years.
1904	September 29	Roaf compelled to pay bank $586.43, one half the shortage in his cash.
1904	October 10	Directors vote to charge off $586.43 account Roaf's "errors in cash."
1905	January 17	Entry in Earl's cash book, "short $50."
1905	February 20	Louis W. Cutting elected assistant cashier. He was also a director.
1905	February 20 to October 7	Cutting assistant cashier and paying and receiving teller, succeeding Bragg. At this time Earl is cashier, Coleman bookkeeper, and Lockhart messenger.
1905	February	Shortage of $25 in Bragg's cash. He paid one half of it a few days after he left bank, although Dresser had refused to count the cash when Bragg left. Dresser gives Bragg letter of recommendation.
1905	September to October	Four more shortages of $100, $20, $100, and $475, respectively, occur while Cutting is teller.

1905 October 7	Cutting resigns on this account at Dresser's request and resignation is accepted by directors, Dresser and Gale and Sumner Dresser being present. Cutting obliged to give note of $700 to make up shortage. Cutting denies responsibility; tells Dresser he thinks there is a thief in the bank.
1905 or prior to May 24, 1906	Coleman given combination to cash box, while acting as teller.
1906 February 5	Coleman begins keeping a personal account with the bank.
1906 March to September (and annually)	Dividends declared at directors' meeting (at the last meeting of each of these months); an examination of bank by directors supposed to be made.
1905 (or 1906) March or April	Earl hands Fillmore the Creighton package, supposing it Fillmore's silverware.
1906 May 24	Coleman takes the first money from the bank, $2000, taking the actual cash from the vault after bank had closed for the day, and restores it the next morning.
1906 November 24	The first stealing by Coleman involved in the present shortage. Same is concealed by him on the deposit ledger.
1907 (or 1908)	Coleman becomes the owner of an automobile.
1905-1907 October to November	Coleman is paying and receiving teller as well as bookkeeper.

1907	January	Barber and Richardson become directors.
1907	January	Dropped balances, raised balances, and false additions begin to appear on depositors' ledger.
1907	January	Correct additions of Coleman's falsely added balance columns begin to differ from the figures "Total due Depositors" on Earl's book.
1907	February	Further false additions on depositors' ledger and further discrepancies (if Coleman's balance had been correctly added) with Earl's book.
1907	March	Similar condition of books. The discrepancies growing in amount until, March 28, 1907, they amount to $9130.
1907	April	Similar condition of books with false additions and discrepancies and shortage growing. The difference between the "Total Due Depositors" on the depositors' ledger and Earl's book, if Coleman's balance columns had been correctly added on April 29, 1907, amounts to $16,300.
1907	May	Shortages practically all charged into depositors' accounts and the deposit ledger apparently balances and compares with the cashier's book.
1907	June	Further raised balances and false additions and discrepancies in item "Total due Depositors." These discrepancies on June 27 amount to $18,000.
1907	July	More raised balances, but apparently

		no incorrect additions of columns. Discrepancies continue between Coleman's book and Earl's book and also between Coleman's own totals and Earl's totals, on numerous days in July, the difference running as high as $18,349.47.
907	August	Lockhart leaves bank after three and one half years as messenger.
907	August	Books show raised balances, false additions, and continued discrepancies between the depositors' ledger and the cashier's book, the same varying somewhat in amount, but in most cases being for the sum of $20,000 or $19,999.62.
907	September	Further raised balances, false additions, and discrepancies between the two books on correct additions and also on Coleman's additions, the discrepancies varying, but running between $20,000 and $27,000, the latter figure from September 19, on.
907	October	Numerous false additions and a few raised balances. Discrepancies between the depositors' ledger and Earl's book of varying sums running from $20,000 to $29,000, the latter amount on October 29 and 31.
907	November	Sundry false additions, dropped balances, including Edwin Dresser's balance, dropped $20,000, and raised balances, and discrepancies between

		the depositors' ledger and Earl's book. These discrepancies run as high as $20,000.
1907	November	Edward A. Paul comes into the bank as paying and receiving teller, and remains there as such until the bank closes.
1907	December	Sundry raised balances, dropped balances, including the account of Edwin Dresser himself, and discrepancies between the depositors' ledger and the cashier's book, running from $20,000 to $21,400.
1907	Exact date not given	Galbraith employed as messenger. He probably was employed in August, after Lockhart left.
1908	Time of year not known, but probably early in year	Police officer Thomas P. Rowe has conversation with Earl *re* Coleman.
1908	January	More dropped balances, raised balances, and discrepancies between the depositors' ledger and Earl's book, the same running up (January 30, 1908) to $28,000.
1908	February	Fillmore discovers loss of his package of money.
1908	February 17	Directors hold meeting. Records show no business transacted, except to approve records of previous meeting. A specimen of most of the records of the directors' meetings.
1908	February	More raised balances, dropped bal-

ances (including Edwin Dresser's balance), false additions, and discrepancies between depositors' ledger and Earl's book, the same being, on February 27, 1908, in the sum of $28,000.

08 March 23 Directors hold meeting and declare dividend if Edwin Dresser, president, deems it advisable.

08 March More false additions, raised balances, dropped balances (including Edwin Dresser's balance), and discrepancies between depositors' ledger and cashier's book, the latter being at times over $20,000.

08 April Fillmore has conversations with Earl relative to failure to find his package.

08 April More false additions, raised balances, dropped balances, and discrepancies between the depositors' ledger and the cashier's book. These discrepancies, however, are few and small, the largest being $1100. During this period substantially the entire shortage was charged into individual accounts.

08 May Only one dropped balance and one false addition. At this time practically the entire shortage was charged into individual accounts.

08 June Numerous false additions, raised balances (Edwin Dresser's account), sundry discrepancies between the total of Coleman's balance columns, if correctly added, and the total due de-

		positors on cashier's book, the largest being $21,400, June 30, 1908.
1908	July	Many false additions and large discrepancies between Coleman's own figures and also between the correct additions of Coleman's balance columns and Earl's book, the same amounting, to July 30, 1908, to $21,900.
1908	July 13	After this time Coleman does not carry any totals to page 14 of his depositors' ledger.
1908	August	Many false entries, dropped balances, raised balances, false additions and extensions, and large discrepancies between correct additions of balance columns on deposit ledger and cashier's book, and between Coleman's own figures and cashier's book, such discrepancies running from about $22,000 to over $38,000.
1908	September 29	Fillmore writes Dresser relative to lost package. September 28, directors declare dividend, usual form, if the president thinks it "advisable."
1908	September generally	Numerous false entries, including raised balances and false additions. Large discrepancies between the correct additions of the balance columns on the depositors' ledger and the total due depositors on the cashier's book. Large differences between Coleman's own figures and the figures on the

		cashier's book. These differences vary from $37,000 to over $46,000.
1908	October (last part)	Fillmore has another conversation with Edwin Dresser; mentions Coleman by name; says it is evident there is a thief in the bank; says Coleman is spending money freely, etc.
1908	October	Numerous false entries on books, including dropped balances, one raised balance, and incorrect additions. Large discrepancies between correct additions of total balance columns and total due depositors as shown on cashier's book; large discrepancies between Coleman's own additions and total due depositors on cashier's book. These discrepancies run from a little over $37,000 to more than $46,000.
1908	November 16	Three directors meet and count the cash.
1908	November	Numerous false entries on deposit ledger, including a very large number of dropped balances, also raised balances, false additions, and also false extensions. Part of the month a correct addition of totals of Coleman's balance columns shows large discrepancies compared with the total due depositors according to cashier's book. Also for part of the month large discrepancies between Coleman's own figures and total due depositors as shown by cashier's book.

		During part of the month these figures corresponded.
1908	December	Numerous dropped balances, raised balances, and an increasing number of false additions. Most of the time large discrepancies between correct additions of Coleman's balance columns and the total due depositors as shown by the cashier's book. These discrepancies run up over $14,000 at times; at other times are as small as $2000.
1909	January (and thereafter until the close of the bank)	Lockhart in the bank occasionally to do special work, as requested by Coleman, Earl approving.
1909	January	Numerous raised balances, dropped balances, and false additions. Nearly all this month large discrepancies appeared between correct addition of Coleman's balance column and the total due depositors on cashier's book. Also large discrepancies between Coleman's own additions and the same figure on the cashier's book. These discrepancies vary from something over $14,000 to something over $23,000.
1909	February (about)	H. Douglas Campbell has conversation with Edwin Dresser about employees riding about in automobiles, etc.
1909	February	Numerous false entries on deposit

ledger, including raised balances and false additions, including a large part of the balance columns on each balancing day. During nearly all the month large discrepancies are found between correct additions of Coleman's balance columns and the total due depositors as shown on cashier's book. Also large discrepancies between Coleman's own figures and the same item on the cashier's book. These figures run from a little over $18,000 to more than $28,000.

1909 March 30 — Directors declare dividend if president thinks "advisable," and make some examination of the assets of bank, taking about all the afternoon after the bank closed. No examination of deposit ledger; no comparison between figures on that ledger and figures on cashier's book.

1909 March — False entries on deposit ledger increasingly numerous, including very many dropped balances, raised balances, false additions, and false extensions. On all balancing days large discrepancies are found between correct addition of Coleman's balance columns and total due depositors as shown by figures on cashier's book. Also large discrepancies between Coleman's own figures and the same item on cashier's book. The discrep-

ancies run from a little over $13,000 to more than $36,000.

1909 April — Numerous false entries, including dropped balances, raised balances, and false additions. On all balancing days large discrepancies exist between the correct addition of Coleman's balance columns and the total due depositors as shown by the cashier's book. These discrepancies run from over $9000 to over $20,000. During this month Coleman's false additions of his balance columns appear to correspond with total due depositors on cashier's book.

1909 May — Coleman employs Lockhart "in his automobile business"—the Kissel Kar Company.

1909 May — Numerous false entries, including dropped balances, raised balances, false additions, false extensions, and false charges to depositors' accounts. Large discrepancies between the correct addition of Coleman's balance columns and the total due depositors as shown by the cashier's book, running from about $16,000 to about $29,000. On almost all the days, but not all, Coleman's false additions correspond with total due depositors on cashier's book.

1909 June — Numerous false entries, including dropped balances, raised balances,

		and false additions. On ten balancing days out of twelve discrepancies exist between the correct addition of Coleman's balance columns and the total due depositors as shown by the cashier's book. These discrepancies vary from a few hundred dollars to over $38,000. On a few days Coleman's own figures differ from the cashier's book, but these differences are mostly very small.
909	July	Coleman becomes treasurer of the Kissel Kar Company.
909	July 14	Kissel Kar Company opens account at bank.
909	July	Large number of false entries, including raised balances and false additions of columns. Very large discrepancies exist between the correct addition of Coleman's balance columns and total due depositors as shown by the cashier's book. On all but two balancing days Coleman's false additions of his balance columns show large discrepancies when compared with the cashier's book. These discrepancies run as high as $87,975 on one occasion, and on almost all occasions are in excess of $77,000.
1909	Summer or Fall	Dr. Wetherbee talks with Barber about Coleman's leaving his auto in front of the bank, etc.
1909	August (about)	Lombard has conversation with Earl

		re Coleman. Earl states same to Edwin Dresser.
1909	August	Numerous false entries, namely, false additions of columns, one or two false extensions, and raised balances. During the entire month increasingly large discrepancies exist between the correct addition of Coleman's balance columns and the total due depositors as shown by the cashier's book. These discrepancies at times are over $94,000. Coleman's own false additions show discrepancies of over $77,000.
1909	September 27	Directors vote dividend if Dresser deems it "advisable."
1909	Fall	Earl notices deposits are rapidly falling off, and directors occasionally talk the matter over. Dresser and Earl talk over the fact that the clearings are large.
1909	September	Many false entries, including raised balances and false additions. During the entire month large discrepancies exist between the correct addition of Coleman's balance columns and the total due depositors as shown by the cashier's book. The discrepancies run from $94,824 to $108,818. During this month Coleman's false additions of his balance columns also show like discrepancies, running from $77,000 to $83,900.
1909	October	Numerous false entries, raised bal-

		ances, dropped balances, and very numerous false additions. Discrepancies rapidly increase between the correct addition of Coleman's balance columns and total due depositors as shown by the cashier's book. These discrepancies run as high as $148,000, and are never less than $115,000. Where he does foot his false additions his figures show discrepancies, when compared with the cashier's book, of never less than $83,000. From this time to ascertain discrepancies it is necessary to add many of the balance columns and then make up the totals.
1909	Fall	Bancroft has conversation with both Dressers regarding the falling off in deposits.
1909	Middle of November	Willard A. Bullard, president Harvard Trust Company, has conversation with Barber regarding "one of his officers in the Bank," and in regard to the falling off in deposits.
1909	November	Earl writes letter to Lombard about Coleman, having previously talked over with Edwin Dresser regarding Lombard's complaint.
1909	November 29	Edwin Dresser makes deposit of $10,000, which Coleman puts upon his pass book but does not put upon the depositors' ledger.
1909	November	Books show many false entries, including dropped balances, raised bal-

		ances (including Edwin Dresser's), false additions, false extensions, and false charges to depositors' accounts. Many balance columns not footed. Where footings do appear, generally false. Discrepancies run as high as $176,000.
1909	December	Many false entries, including dropped balances, raised balances, and false additions. After the middle of the month no balance columns whatever are footed, and discrepancies run as high as $188,000.
1910	January	Many false entries, dropped balances, raised balances, and false additions. No balance columns footed on any page. On one day the discrepancy amounts to $194,000. On every other day when balances are extended it amounts to more than $200,000, and on January 24, 1910, it amounts to almost $225,000.
1910	February 19	Willard A. Bullard and clerk discover defalcations in examination of the book in less than one half hour.
1910	February 21	Bank closes. Bancroft has conversation with Mr. Barber, Mr. Gale, Edwin Dresser, and Sumner Dresser. Books show condition similar to January, and no balance columns footed on any page.
1910	February 23	Receiver appointed.
1906		The national bank examiners visited

907
908
909

the bank each year about June 1st and December 1st, sometimes a day or two prior to the first of the month; other times a few days later.

The following dates and figures have been selected to show he apparent downward course of the deposits. There were imes between these dates when deposits temporarily seemed o increase, but the downward tendency is shown by the figures, and, as known to the directors, indicated a steady and heavy drop. The true deposits on any date may be ascertained by taking the figures given for that date and adding he amount of Coleman's stealings up to that date.

Jan. 2, 1909,	$338,488.70	Oct. 23, 1909,	$261,877.81
Jan. 9, 1909,	365,315.34	Oct. 30, 1909,	252,392.27
Jan. 16, 1909,	367,210.66	Nov. 6, 1909,	240,032.01
Jan. 23, 1909,	334,024.88	Nov. 13, 1909,	212.657.46
Jan. 30, 1909,	322,893.01	Nov. 20, 1909,	199,354.72
Mar. 20, 1909,	336,252.04	Dec. 4, 1909,	161,291.95
Mar. 27, 1909,	314,292.78	Dec. 11, 1909,	168,717.51
Aug. 7, 1909,	341,548.92	Dec. 18, 1909,	156,685.33
Aug. 14, 1909,	318,929.88	Dec. 21, 1909,	153,372.01
Aug. 28, 1909,	291,547.47	Dec. 28, 1909,	135,662.65
Oct. 16, 1909,	276,706.78		

February 21, 1910 (date bank closed), $107,607.85.

[illegible]

JOHN [illegible]

[illegible]

[illegible]

JOHN [illegible]

JOHN [illegible]

JOHN [illegible]

[illegible]

[illegible]

Supreme Court of the United States

OCTOBER TERM, 1919

No. 155

JOHN L. BATES, RECEIVER OF THE NATIONAL CITY BANK OF CAMBRIDGE, MASSACHUSETTS, *Appellant*,

v.

SUMNER DRESSER, ADMINISTRATOR OF THE ESTATE OF EDWIN DRESSER, DECEASED, *Appellee*.

No. 156

SUMNER DRESSER, ADMINISTRATOR OF THE ESTATE OF EDWIN DRESSER, DECEASED, *Appellant*,

v.

JOHN L. BATES, RECEIVER OF THE NATIONAL CITY BANK OF CAMBRIDGE, MASSACHUSETTS, *Appellee*.

No. 157

JOHN L. BATES, RECEIVER OF THE NATIONAL CITY BANK OF CAMBRIDGE, MASSACHUSETTS, *Appellant*,

v.

JOHN M. DEAN, EXECUTOR OF GEORGE W. GALE, DECEASED, SUMNER DRESSER AND DAVID A. BARBER, *Appellees*.

BRIEF OF SUMNER DRESSER, ADMINISTRATOR OF EDWIN DRESSER, DECEASED, AND OF SUMNER DRESSER AND OF JOHN M. DEAN, EXECUTOR OF GEORGE W. GALE, DECEASED

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BRIEF OF SUMNER DRESSER, ADMINISTRATOR OF EDWIN DRESSER, DECEASED, AND OF SUMNER DRESSER AND OF JOHN M. DEAN, EXECUTOR OF GEORGE W. GALE, DECEASED.

I

STATEMENT OF THE CASE.

A. OUTLINE OF THE PROCEEDINGS.

This is a bill in equity brought on November 3, 1910, by John L. Bates, receiver of the National City Bank of Cambridge, Massachusetts, a small bank with a capital stock of $100,000, against Edwin Dresser, George W. Gale, Sumner Dresser, David A. Barber, and George E. Richardson, five of the seven directors of the bank, to recover the loss which the bank sustained through the

defalcations of George W. Coleman, its book-keeper, the bill of complaint alleging that the losses were due to the negligence of the defendants. These defalcations, amounting to $310,143.02 (Record, p. 97), occurred during the period extending from November 24, 1906 (p. 1455), to the close of the bank on February 21, 1910 (p. 29).

The case is unprecedented in the history of banking in that (1) *practically all of the stealing was done by a mere book-keeper* who, during the time when all but the first $30,000 of the stealings were accomplished, had no access to the cash or securities of the bank, who had nothing to do with the investment or handling of the bank's funds, and who worked at all times under the supervision of an admittedly honest and experienced cashier who had no more suspicion of his honesty than had the directors; and (2) *the scheme devised by Coleman for stealing and concealing his thefts was absolutely novel and enabled him to escape detection not only by the cashier, but by the bank examiners at each of their semi-annual examinations.*

On October 16, 1911, the case was referred to Robert O. Harris as special master, and after numerous hearings which extended over three years the master filed his report on January 2, 1915 (pp. 29–102). In this report after an exhaustive review of the evidence he found that there was no negligence on the part of any of the directors.

The receiver filed exceptions to this report, and the case was then heard before Bingham, J., in the District Court, who had before him a report of the evidence. On December 17, 1915, Bingham, J., rendered an opinion in which he found that all of the directors were negligent and were liable for all sums stolen by Coleman after September 30, 1907 (pp. 175–211). On February 1, 1916,

a decree was accordingly entered in the District Court against all of the living defendants and the estates of Edwin Dresser and Richardson, who had died, in the sum of $283,218.20, with costs (p. 172).

The directors appealed and the case was heard in the Circuit Court of Appeals on March 20, 21, 22, and 23, 1917 (p. 1676), and on March 5, 1918, the court announced its decision (pp. 1647–1672). The court reversed Bingham, J., on nearly every material point. The judges were unanimous in holding that none of the directors except Edwin Dresser was liable for any part of the loss. As to Edwin Dresser, the president of the bank, a majority of the Court, Brown, J., dissenting, held that he was negligent "in disregarding Fillmore's statements about Coleman" (p. 1662) in October, 1908, and on that account was liable for Coleman's defalcations from December 1, 1908. A final decree was accordingly entered (p. 1676) remanding the case to the District Court, with directions to dismiss the bill as against all the directors except Edwin Dresser, and to enter a decree against Sumner Dresser, administrator of the estate of Edwin Dresser. The amount of the defalcations for which Edwin Dresser's estate was thus adjudged to be liable is $264,088.02, as may be figured from the table of monthly stealings in the master's report (p. 82).

From the decree of the Circuit Court of Appeals, Sumner Dresser, administrator, appeals, as does the receiver.

B. Summary of the Facts.

There was but little dispute about the underlying facts and not very much conflict in the evidence. Much the greater part of the testimony for the receiver was furnished by Coleman and Fraser, an expert accountant;

with the aid of their testimony covering hundreds of pages in the record Coleman's methods were disclosed and the details of his stealings brought to light.

(1) *The Bank, its Officers and administrative Force.*

The National City Bank was organized in 1865 (p. 1364) with a capital of $100,000 (p. 3). Before any stealings by Coleman the average deposits on quarter-day were in 1905 $286,934 and in 1906 $310,628 (p. 1274).

Edwin Dresser was one of the largest stockholders and depositors, his personal deposit account being an inactive one (p. 64). He had been a director for many years and was president of the bank from a time long before the employment of Coleman down to the closing of the bank (p. 32).

Neither Edwin Dresser nor any of the other directors were familiar with the system of keeping the books of a bank (p. 80). Edwin Dresser was president and general manager of the Standard Diary Co. and for a great many years had also been a member of the Board of Investment of the Cambridge Savings Bank (p. 1164); Gale was engaged in the lumber business (p. 1246); Sumner Dresser, son of Edwin, was assistant treasurer of the Standard Diary Co. (p. 1291); Barber was engaged in the manufacturing of piano actions (p. 1267); and Richardson was paying teller in the New England Trust Co. of Boston (p. 1219). Neither the president nor any of the other directors received any compensation or fees for their services (pp. 314, 1294, 1660).

The administrative force of the bank consisted of Frank L. Earl, cashier from August, 1903, to the close of the bank (p. 299); Coleman, messenger from July, 1903, to January 1, 1904, and thereafter book-keeper, doing also the work of teller from October, 1905, to November,

1907 (p. 32); Edward A. Paul, teller (p. 32); and a messenger (p. 314).

(2) *Coleman.*

Coleman was originally employed by Earl, the cashier (p. 525), being then seventeen years old. He had graduated from the Burdett Business College, where he had taken a course in accounting, commercial law, and banking (p. 32). As book-keeper, after January 1, 1904, he kept merely the depositors' ledger, in which it was his duty to enter all deposits and withdrawals to the accounts of the individual depositors. He was "the son of a reputable father, who was engaged in business in Cambridge and who was a man of some financial standing" (p. 78), and he lived with his parents (p. 315). At the bank he was well-behaved, industrious, and courteous, and was liked by the officers and depositors. There was no evidence that he was ever criticised by any one in the bank because of anything in his conduct or bearing. The cashier liked him very much and thought him an excellent young man (p. 78). He was "of more than average skill and brightness and was entirely capable of doing his work well," and there was no negligence in employing him (p. 90). As messenger he had been frequently intrusted with large sums of money, either bills or silver, which he carried alone to the Shawmut Bank in Boston, perhaps as much as a hundred thousand dollars in all (p. 337). As book-keeper he did his work honestly and properly for several years and the cashier was justified in feeling confidence in him (p. 96). Neither the cashier nor any of the directors at any time entertained the slightest suspicion as to his honesty (pp. 315, 319, 1166, 1168, 1246. 1248, 1270, 1295).

At the hearings before the master he was called by the

receiver as his witness, and testified fully and on a great many different days as to all material matters, admitting all the thefts charged against him and explaining in detail the various methods by which he concealed them (p. 43).

(3) *Coleman's Methods of Stealing and of Concealing his Thefts.*

Coleman had a small deposit account with the bank and his thefts were accomplished by drawing checks on that account to the order of one or another of several stock-brokers in Boston. These checks he would either take in person, or send by messenger, to the broker, who would give in exchange his own check for a like amount drawn upon some bank in Boston, and the latter check Coleman or his messenger would immediately cash at the bank upon which it was drawn (p. 40).

All the Boston banks except the Shawmut, which was the correspondent of the City Bank, and the First National, sent their checks upon the City Bank through the clearing house. The checks from the clearing house for the City Bank would arrive in Cambridge by mail the next morning in a single envelope. The envelope would generally be taken from the post-office by the messenger, although sometimes by Coleman, and carried to the bank, where one or the other of them would open it. After it had been opened it was the duty of the book-keeper to take the checks and charge them on his ledger to the proper accounts (p. 34).

Each bank in Boston, other than the Shawmut or the First National, which on any particular day received checks on the City Bank, would send them to the clearing house with a slip showing the amount of each check, but not the drawer's name, and the total of all the checks.

At the end of each day the clearing house would make out what was called the "large clearing house slip" on which was typewritten the total shown on each one of the slips of the different banks, added so as to show the total of all of them, but without designating the banks from which the checks came, the small slips themselves showing that. This clearing house slip, with the small slips from each bank, would be mailed with the checks to the City Bank (p. 34).

When Coleman received the clearing house checks and slips at the bank as above stated, he would properly enter and make record of all the other checks, but would take out and suppress any of his own which were among them. The cashier did not see the checks coming from the clearing house, but received from Coleman the slip giving the amounts, and drew the bank's check, payable to the clearing house for that amount, which, of course, was larger than it should have been by the amount of any check or checks drawn and suppressed by Coleman (p. 41, 303).

The depositors' ledger, which was kept by Coleman, showed the debits and credits on the account of each depositor day by day and is described in detail in the master's report (pp. 36-38). A specimen page is inserted in the record (p. 1433).

Coleman concealed his thefts by various different kinds of false entries on this ledger, the most common of his methods being the following (p. 42) :—

(1) Charging the amount taken to some large account.

(2) Making false and excessive additions to the "total check" column or columns and thereby apparently increasing the actual legitimate draft on the bank's resources.

(3) Making false additions to the "total balanc columns, the additions being less than the true tota and thus, when the total of all the balance columns w made up at the close of the day's business, causing t amount on the depositors' ledger to be less than actually was.

(4) Dropping the balances of individual deposito without entering any check or checks to justify the dro

Coleman testified that he originated this method stealing and that he had never heard of its being pr tised by any one else (p. 839).

The expert accountant Fraser, employed by the ceiver, testified that he had never known of such a meth (p. 1158). That it was unique was "agreed by all coun and testified to by the bank examiners at the hearin (p. 41).

No one connected with the bank except Coleman ceived or had the benefit of any of the money stolen him.

After Coleman ceased to act as teller in Novemb 1907, he had nothing to do with the handling of the ca or securities of the bank (pp. 53, 192, 316, 1648). T cashier and the teller were the only ones who cou deliver money to persons presenting checks to be cash and the president and the cashier alone could sign chec upon the bank's deposit account in the Shawmut Ba *"There was no way apparently by which a mere boo keeper could draw money from the bank or its depo taries, except possibly by forgery, which soon would ha been exposed"* (p. 91).

It was Coleman's duty, as book-keeper, to charge t checks from the clearing house to the individual accou

on his ledger, and it was obviously important that this be done the first thing in the morning so that the correct balance due each depositor on that day should appear on the book as early as possible (pp. 300, 303). It was, therefore, natural and proper that Coleman should open the clearing house envelope on his arrival at the bank. It is to be observed, however, that he was not left to do this work without any check, for the messenger assisted him, and together they examined the clearing house checks, and verified and checked them off with the clearing house list (pp. 300, 303, 309). Earl accepted the totals thus verified and checked (p. 309), and did not himself examine the checks or the small slips attached to each check (p. 309). If he had, Coleman's scheme would have been exposed, but Earl did not apprehend danger from this practice (pp. 309, 319).

The novelty and ingenuity of Coleman's scheme did not stop with his stealing of the bank's money in the only way in which, according to Currier, the national bank examiner, he could get it (p. 1215), but the method of concealment which made its continuance possible was equally new and deceptive. He concealed his stealings by lessening the liability to depositors shown on his book. When it is considered that the bank's deposits were held on demand, that the cashier and teller had constant occasion to refer to Coleman's ledger in order to ascertain the balance due depositors (pp. 1359, 351); that the daily checking system in the bank required the amount of deposits independently computed by the cashier to agree with the amount of deposits shown on the depositors' ledger (p. 340); that Coleman was out at lunch for about an hour every day (p. 843), and that at the end of each month depositors brought their pass-books in to be balanced (pp. 340, 326), it is easy to see why no one would have conceived it to be possible to conceal stealings by any such method.

The successful operation of such a scheme of
cealment for any length of time would seem to re
a memory and facility in changing entries, as occ
might require, beyond the capability of any one n
collusion with the officer in charge of the accou
system.

As long as Coleman was able to carry out this ext
dinarily exacting scheme of concealment, it had
peculiar merit, from his point of view, that the ge
ledger and all the other books in the bank were al
seemingly absolutely correct; that there would be
dication of a loss of the bank's property, but only
crease of its liabilities; and that an examination o
bank would show all the assets called for.

It was, obviously, a realization of the apparent
superable obstacles in the way of a book-keeper in
man's position who should undertake to steal the b
money and conceal his theft for any length of
that led the receiver in his brief in the Circuit
of Appeals, as Brown, J., in his dissenting opinion
noted, to characterize what Coleman accomplish
"the seemingly impossible" (p. 1672).

(4) *The Percentage of false Entries, and the T
when they were made.*

With respect to the number of false entries on
man's books, the master made the following find
which stand uncontroverted:—

> "The errors and false entries occurred, or were ma
> intervals and through a period of several years.
> entries that were deliberately false were, of course, int
> to deceive. When brought together in one mass, as a
> of long, thorough and expert examination, and presen
> such carefully prepared form, the number appears, a

large and imposing. No such presentation of them was ever made to the defendants, as they were scattered along through the different individual ledgers. The total number of them, while large, is, however, but a very small percentage of the total entries on the books. At the hearings this question was raised and the expert was asked to get, or make, an estimate of the proportion of false or clerical errors to the whole number of entries on the books. While it was impossible to make an exact statement, it was possible to make a fair estimate and the total number of entries on Coleman's books from July 1, 1907, to February 21, 1910, was estimated at about 950,000. The actual clerical and false entries were stated to be, and this was an exact figure, 2,571, leaving of correct entries approximately 948,000. This showed the percentage of about 2½ errors and false entries to the thousand" (pp. 62–63).

It is impossible to tell when the various false entries on the deposit ledger were made. Many of them did not represent money taken at or about the apparent date of the entry, but were designed to cover up stealings made long before (p. 83). It cannot therefore be assumed as certain that the entries now found on the depositors' ledger as of any particular date would have been found had an examination been made on that date (Opinion of Circuit Court of Appeals, p. 1656). There is nothing to justify the statement of counsel for the receiver (Brief, p. 57) that altered entries made subsequent to their apparent date are few in number and are found only on a few days just before the visit of the bank examiner.

In shifting his methods from time to time Coleman adopted various book-keeping devices. For example, after having used the method of increasing the footing of the "total checks" column and decreasing the "balance" column, he would sweep the stealings of a number of

days into one total and drop the balance of one or more of the large depositors who had inactive accounts. He would then change to other methods of concealment.

As the master finds:—

> "Examination of his books at such periods, thus manipulated and prepared, carried to the extent of adding every credit column, every debit column, and striking the balances, would have shown a correspondence with the cashier's balances and could not have been successful in disclosing his frauds without either examination of all the deposit slips, or calling in the books of the depositors for the purpose of obtaining their figures in regard to deposits and withdrawals" (p. 83).

So the Circuit Court of Appeals says:—

> "He adapted his methods of concealment to the varying danger of detection as it appeared from time to time. In particular, he had on many days so raised or lowered the amounts shown as balances due individual depositors as to bring the correct addition of the footings or columns in agreement with the cashier's ledger and to require ascertainment of the true balance due depositors in order to detect the shortage" (p. 1656).

The master and the Circuit Court of Appeals agreed that the depositors' ledger "is a difficult book to follow and one in which a person not thoroughly familiar with it and used to handling it would not be likely to readily detect error" (p. 1655).

(5) *The general Ledger and the System of checking Coleman's Work.*

There was an excellent accounting system in the bank, including such checks and safeguards as experience had shown to be adequate in the past.

This system, and the duty of accounting for the bank's

money and property, was in charge of the cashier (By-laws, p. 1371).

Only he and the teller, after November, 1907, had access to the cash and securities, and at the end of every day the teller had to account to the cashier for the money in the teller's hands (pp. 320, 581).

The cashier himself kept the check-books for the bank's deposits in other banks, and only he and the president had power to sign checks on these accounts (p. 97). The cashier in practice signed practically all these checks.

The cashier had also a direct method of checking the book-keeper's work. He kept the general ledger, sometimes called the cash book or cashier's ledger (p. 33), upon which the amount of each deposit and of each check paid during the day was entered by him, but without the names of the parties making the deposits or drawing the checks (pp. 34, 38, 59). Similarly, the amount of the check sent the clearing house and that sent the First National Bank were entered on this book and the account with the Shawmut Bank was credited with the amount due it (p. 35). All the transactions of each day (with depositors) were thus entered on this book, just as they were supposed to be entered on Coleman's, except that the check sent the clearing house was entered as a single item, whereas on Coleman's books the individual checks from the clearing house were of course supposed to be entered. A specimen page of the general ledger is inserted in the record (p. 1407A).

> "In the regular course no money would be drawn that was not known to the cashier and entered on this book" (p. 39).

At the end of the day the book-keeper's total of checks and deposits for the day should, of course, agree with the cashier's, and there was thus a means of checking the accuracy of each man's work. The total balance due the

depositors should also agree. The book-keeper and the cashier compared their totals of checks and deposits every day, and twice a week the total balances were noted and compared (p. 341). Coleman had free access to the general ledger and consequently could see to it that the figure which he gave the cashier as representing his totals agreed with that on the cashier's book, and the cashier was led to believe that such agreement always existed. Occasional minor discrepancies which were discovered were always found to be due to some error of either the book-keeper or the cashier, which was at once corrected (pp. 53, 59, 96, 340).

At the end of every month the depositors left their pass-books and Earl, Coleman, the teller, and the messenger all took part in balancing them (pp. 326, 642). Coleman called off the balances from the ledger, and it was the duty of one of the others to see if they agreed with the balances on the pass-books (p. 32). Coleman kept the run of his stealings at first in his head and afterwards in memoranda (p. 43), and when the pass-books were balanced he was able to call off apparently from his ledger the correct amount whether it actually so appeared on the ledger or not. No complaints were ever made by the depositors of there being wrong balances on their books except in two or three instances, where the cashier found that the depositors had themselves made mistakes (pp. 325–328).

In addition to the foregoing there were other checks on the honesty and accuracy of the book-keeper's work. The cashier before certifying a check always consulted the depositors' ledger to see whether the depositor had a sufficient balance for the purpose (p. 351). The teller in cashing checks also had frequent occasion to refer to Coleman's ledger (p. 351). Depositors would often call to inquire the status of their accounts, and if Coleman

was absent or not at his desk, it was the teller's custom to go to the depositors' ledger and ascertain the facts for himself (p. 1359).

As is stated by counsel for the receiver (Brief, p. 125), "The checking system provided between the depositors' ledger and the cashier's book was such as to lead to a speedy detection of errors, *if that checking system had been lived up to.*" The two books "were a daily check upon each other as regards the total due depositors, *if properly used*" (Receiver's brief, p. 52).

That the checking was not effectually done was never suspected by the directors nor did any reason appear why they should have suspected it (pp. 80, 81).

(6) *The Cashier.*

Earl was chosen cashier on July 30, 1903, succeeding one Davis who had been cashier and also a director for a considerable period (p. 32). For some time prior to his appointment Earl had been assisting Davis on the books and had also acted temporarily as book-keeper and as teller. When Davis resigned he recommended him as his successor (pp. 64–65.)

Earl had had many years of banking experience. Starting at the age of nineteen, he had been employed for twelve years by the First National Bank of Lynn first as messenger and afterwards as book-keeper. He went from there to the Security National Bank of Lynn, where he served nine years as receiving and paying teller. Afterwards he was cashier of the Manufacturers National Bank of Lynn for eight years (p. 92). With reference to his work at the National City Bank the master finds:—

> "There does not appear anything to show that he was incompetent, or that his work as an accountant showed lack of skill or ability.

> He kept his books accurately and in all his conduct was straightforward and open. No charge is now made, no claim presented, that any part of the losses are due to misconduct on his part, or in collusion with Coleman" (p. 90).

Throughout his period of service in the National City Bank he was "competent and accurate in all his own accounting and book-keeping, and was entirely honest" (p. 93). As to his honesty there has never been any controversy (Receiver's brief, p. 37). As to his competency the receiver maintains that the master found him to be competent after excluding evidence that bore on the subject (Receiver's brief, p. 117). The evidence referred to, consisting of certain statements made to Earl with reference to Coleman, was not offered on this point, and was excluded because the statements were not brought to the notice of the directors.

The master found that there was no negligence on the part of the directors either in employing Earl as cashier or in retaining him in office thereafter (p. 93), *and this finding was not disturbed by either Court.* In the District Court the matter is thus dealt with:—

> "Much time was taken up in the argument of the case in discussing the competency of Mr. Earl as bearing upon the question whether the directors were negligent (1) in employing him in the first instance, and (2) in retaining him in their employ. The master, in his report, disposes of this question of negligence by finding that Earl was competent. I am unable to find that the directors were negligent in the original employment of Earl. . . . Whether the directors were negligent in retaining him, I regard of little importance in view of the findings made" (p. 210).

The Circuit Court of Appeals said:—

> "The [District] Court, here agreeing with the master, expressly declined to find the bank's directors negligent in

employing Earl originally, as they had done in 1903; and it nowhere overruled or disturbed findings by the master that they had not been negligent in retaining him in office. The court regarded the question whether or not they were so negligent as of little importance in view of the findings made by it" (pp. 1649–1650).

And the Circuit Court of Appeals, like the District Court, did not disturb the findings.

(7) *The President.*

With regard to the duties performed by Edwin Dresser at the bank the master found as follows (p. 33) :—

"Mr. Edwin Dresser, the president, came to the bank every morning for an hour or two, went over the state of the accounts with the cashier, Mr. Earl, considered questions of discounting or purchasing of paper or other securities for investment, and then went to his own place of business. In the afternoon he would return again for an hour, and from the cashier ascertain what had gone on during the day."

And again (p. 64) :—

"It was his custom to go to the bank every morning and ascertain from the cashier the state of the deposits, pass upon questions of investments and discounts, and give such directions as were needed. He was not an accountant or book-keeper, and was not familiar with banking methods of keeping either individual or general accounts, but left that to the cashier, whose duty it was to supervise the actual keeping of the accounts, the discounts, maturities of paper, etc. It was customary for him, either alone or after conference with the cashier, to make loans, and in many instances in cases of known customers it was customary for the cashier to make loans."

The loans were always reported to the directors at their next meeting and approved by them (pp. 64–65).

The master's finding as to the time spent by Dresser at the bank goes (as is stated in the Receiver's brief, pp. 124–125) somewhat beyond the evidence, which was as follows: Earl testified that Dresser would stop at the bank practically every morning on his way to Boston and remain for an hour to an hour and a half. He would "pass the time of day, and chat, and want to know if there was anything new, any money to spend, to buy any paper or anything. . . . It was his practice to drop in quite often in the afternoon, anywhere from 3 to 4 or 4.30, and on these occasions if there were any discounts to be passed upon we would talk them over, or anything which lay over" (pp. 315, 322, 323). Dresser himself testified that his stay at the bank mornings lasted from three-quarters of an hour to an hour and a half; that "it depended on how many brokers were in trying to sell paper"; that he usually came again in the afternoon at about quarter of three and "stayed not a great while" (p. 1165).

Dresser performed with unusual fidelity the duties ordinarily undertaken by the unsalaried president of a small bank, that is, the duty of looking after the discounts and other investments of the bank's funds. That this work was faithfully and excellently done is clear, as it is uncontroverted that the bank's investments were in first-class shape (p. 1174).

Dresser was regular in his attendance at directors' meetings (pp. 65–66). Except as above indicated he had little to do with the management of the bank, the evidence merely showing occasional conferences many years before with tellers over shortages in cash (pp. 74, 76), and on one occasion, in 1905, a request to a teller, who was also a director, to resign (pp. 77, 882).

Like the other directors, Dresser relied on the cashier to supervise the accounting and other details of the bank's business (pp. 64, 81).

(8) *The Directors.*

The directors were supposed to meet every Monday morning and did so except on somewhat rare occasions (pp. 65–66). At each meeting the cashier presented a statement of the condition of the bank, showing its assets and liabilities and the amount of free money available for investment. From this the directors could judge whether there was money enough to make additional loans or other investments (p. 56). Loans which had been made during the previous week were approved (pp. 64–65).

The by-laws of the bank, adopted by the directors in 1865 (p. 1653), contained this provision:—

> "SECTION 19. *Examination:* There shall be appointed by the Board, every six months, a committee whose duty it shall be to examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are accurately kept, and the condition of the bank in a sound and solvent condition; the result of which examination shall be reported to the Board at their next regular meeting" (p. 1373).

The records of the bank showed no appointment of committees under this by-law, but showed examination by the directors on November 16, 1908, and March 30, 1909, and no others (p. 70). The records of the meetings were, however, kept in very brief and stereotyped form (p. 69), and the master found on oral testimony (Sumner Dresser, p. 1307; Gale, p. 1281; Edwin Dresser, p. 1185) that there were other examinations by the directors as a board. The District Court reversed this finding (p. 194). The Circuit Court of Appeals found it unnecessary to determine whether this action of the District Court was justified, holding that under the circumstances

of this case the directors were not necessarily negligent even if they made no examinations at all (p. 1653). It was conceded that at such examinations as were made the cashier's figures as to the amount of the deposits were accepted as true and the depositors' ledger never examined, and the court held that no negligence was shown in this regard (pp. 1652–1657).

> "The examinations were confined to going over the cash and securities, and checking them with the cashier's reports, verifying the accounts with the depositaries as stated by the cashier, passing upon the worth of the securities and loans, with a view of deciding what should be crossed off and charged to profit and loss account, and separating the cash into different kinds, as gold, silver, legal tender, notes, etc. The amount of deposits due to depositors was taken from the cashier's statement as to the total amount of deposits in the first instance as correct. It would be, and apparently was, verified by his showing of expenses paid, investments made, cash on hand and deposits with other banks" (pp. 70–71).

There was no evidence of any instance in which the cashier's statement of resources or liabilities was found erroneous except that the statements were of course in point of fact inaccurate as to the deposits by the amount of Coleman's stealings (p. 71).

The directors did not know how the clearing house envelope was handled (p. 80). Davis, who preceded Earl as cashier, had been accustomed to open it himself and examine the checks. Edwin Dresser testified that he supposed "that Earl did as Davis had done" (p. 80).

From the early part of 1907 down to the closing of the bank the master found (though without evidence to support the finding, as will be later pointed out) that Coleman was spending money freely in Boston and living a fast life. The directors did not know this (p. 78).

(9) *Coleman's Absences from the Bank.*

The amount of Coleman's stealings month by month is stated in the master's report (pp. 81–82). By the summer of 1907 they amounted to $20,000 and steadily increased thereafter. The skill with which they were concealed on his ledger is shown, not only by the fact that they escaped the attention of the bank examiners, as will be hereinafter pointed out, but also by the failure of the cashier and the tellers who had frequent occasion to examine the book during Coleman's absences to discover anything suspicious about them until just before the close of the bank, when the teller Paul discovered one of the false entries under circumstances hereinafter stated.

Even while Coleman was present, his book was frequently referred to by the cashier or the teller or the messenger (pp. 338, 643).

Coleman went out regularly for luncheon and was gone on an average of about an hour (p. 842).

In 1907 Coleman had no regular vacation, but was away at times "anywhere from half a day to three or four days." While he was absent his work was done by the cashier or the teller or the messenger, all of whom made entries on his book and none of them found any errors there (pp. 644–646).

After he left his position as messenger, Lockhart was frequently employed temporarily by the bank and at various times took Coleman's place during the latter's absences (pp. 311–312). He testified that he never discovered any false entries on the ledger (p. 866).

In the summer of 1908 when the defalcation had risen to about $45,000, Coleman had a vacation lasting seventeen days and either Lockhart or Paul kept his ledger. Neither one of them discovered any errors (p. 702).

In the summer of 1909 the stealings had amounted to

about $112,000. Coleman had no vacation that summe but for one reason or another most of the entries on th depositors' ledger for considerable periods were made b Lockhart (pp. 736–742).

Paul, who was employed as teller from 1907 to th close of the bank, was familiar with Coleman's ledg and had frequent occasion to examine it to ascertain d positors' balances. He found many errors, alteration and corrections which he sometimes spoke to Colema about, but never mentioned to anybody else (p. 1359 About two weeks before the bank closed he found a pa ticularly grave error in one account which he could n recall, and spoke rather sharply to Coleman about it (1359), but he did not report the matter to any one. Th was presumably one of the false entries (see p. 646).

(10) *The National Bank Examiners.*

During the time of Coleman's stealing two nation bank examiners alternated in making semiannual exa inations of the bank, one coming in June and one in D cember of each year. Neither examiner found any ev dence of embezzlement or misuse of the funds of the ban or of incapacity, negligence, or of misconduct on the pa of Coleman.

The directors relied upon these semi-annual examin tions (Edwin Dresser, pp. 1368–1369; Barber, p. 127 Sumner Dresser, pp. 1311–1312). Edwin Dresser alwa saw the bank examiners unless he happened to be in Ne York at the time of the examination and the cashier al saw them. Mr. Dresser always asked them about th condition of the bank, and the other directors we always informed of what the examiner said. The on criticisms which the bank examiner ever made concerne overdue paper. If the comptroller of the currency ha

any criticism to make, he would write (pp. 334, 339, 1168–1169).

There was evidence that it was not customary to employ auditors in banks of the size of the City Bank (p. 1311), and there was no evidence to the contrary.

Currier examined the bank June 7, 1907, June 16, 1908, and June 15, 1909 (p. 1190). Pepper examined the bank in December of each of these years (p. 1226).

Pepper's report of his examination in December, 1909, when Coleman's stealings were at or near their highest mark, appears in the record as Exhibit 144 (p. 1443).

Currier testified that the depositors' ledger was apparently correctly kept and that he saw nothing to indicate that Coleman was not a competent and honest bookkeeper (p. 1198). In June, 1909, a decrease of $36,000 in the deposits as compared with June, 1908, was shown, but otherwise the condition of the bank appeared to be about the same (p. 1199). The fact that some of the footings were in pencil and not in ink was not a cause for suspicion (p. 1203; and see Pepper, p. 1235). Currier's examinations lasted for several hours. Short of examining and comparing the depositors' pass-books (which bank examiners are not allowed to do, p. 1192), he made every kind of an examination which he regarded as necessary to determine the condition of the bank (pp. 1197–1198).

Pepper testified that on each of his visits he examined both the cashier's ledger and the depositors' ledger and found that they agreed and that he observed no error or irregularity anywhere, and neither saw nor learned anything to reflect upon the capacity or honesty of Coleman (pp. 1227, 1233, 1235). Each of his examinations occupied six hours or more (p. 311). His report for December 3, 1909 (p. 1443), shows deposits of $152,806.30, the general condition of the bank good, its business fairly

prosperous, its officers capable, prudent, and of g
reputation, and their management efficient (p. 1449)
also appeared in the report that "books of daily bal
system, in use for individual ledger accounts, appea
be proper and promptly posted, balanced twice a w
(p. 1444).

At the time of this examination Coleman's steal
amounted to over $230,000 (p. 82), and although he
unprepared for this examination and was anticipa
the detection of his stealings, his extraordinary ski
concealing them was such that he was able, while Pe
was in the bank making the examination, to alter fig
and make false entries sufficient to prevent any suspi
on the part of the bank examiner (pp. 72–73).

(11) *The alleged Reasons for Suspicion of Coleme*

Before the master and in the District Court cou
for the receiver claimed that various incidents in the
tory of the bank should have aroused suspicion of C
man on the part of the directors and were sufficien
charge them with negligence. At the present stage o
case it seems that the only ones which are now to b
garded as material are the so-called Fillmore war
(described in the master's report, pp. 86–88), Colem
ownership of an automobile, Dresser's alleged knowl
of Coleman's speculations and speculative habits, an
abnormal decline in the deposits in the fall of 1909.
these matters will be dealt with hereafter.

C. The Grounds of the Decisions below.

The master's report is elaborate. It sets forth in detail the system of accounting in the bank and Coleman's methods of stealing and of concealment, and the way in which his stealings escaped detection by the cashier and by the bank examiners. The master finds, as has been stated, that Earl was a proper man to be appointed cashier in 1903, that there was no negligence on the part of the directors in retaining him in office, and that nothing occurred which should have led them to believe that he was not properly supervising Coleman's work. The master deals with the various circumstances which the receiver claimed should have aroused suspicion on the part of the directors, makes various important findings some of which have been referred to above, and states his conclusion as follows:—

> "Notwithstanding the various incidents that occurred between the time that Coleman became bookkeeper in 1904 and the closing of the bank in February, 1910, which, in the light of present knowledge, may seem to have been suggestive of irregular conduct, they do not seem to me as they occurred and under the daily conditions then existing, to have been such as reasonably to have caused the directors to have suspected either Coleman personally or that the accounts were being falsified to cover peculations, and to make inspection of his ledger or to have an auditing of the entire accounts of the bank" (p. 97).

Judge Bingham in the District Court, on the other hand, although not reversing the master's finding that due care was used in employing Earl and retaining him in office, held all the directors liable for all sums stolen after September 30, 1907. This was on the ground that the directors were bound to make periodical examina-

tions of the bank, and in connection therewith to compare the depositors' ledger with the cashier's ledger (p. 195) and add columns to detect errors (pp. 208–209); and that if they had done so *on the particular date named*, to wit, September 30, 1907, they would have discovered the irregularities. Secondarily, Judge Bingham held them all liable for the stealings after the end of September, 1909, on the theory that when the shrinkage in deposits became abnormal they should have called for and examined the checks that were in the bank (p. 209). He also held Edwin Dresser liable on the additional ground of the Fillmore incident and Mr. Barber liable from December 1, 1909, for giving no heed to certain remarks made by one Bullard (p. 209).

The Circuit Court of Appeals reversed the District Court on almost every material conclusion. The judges were unanimously of the opinion that the directors other than Dresser were not negligent in any respect. By a majority of the court, Dresser was held liable, on account of the Fillmore conversation, for losses from the end of November, 1908. Brown, J., dissenting, held that Dresser should be entirely exonerated, on the primary ground that the majority of the court gave the Fillmore incident "undue and artificial importance as a notice putting Edwin Dresser on guard against Coleman as an untrustworthy person" (p. 1666).

In view of the arguments which have heretofore been made in support of the receiver's contention that there were many instances of negligence on the part of the directors *before* September 30, 1907, it is important to note that the master, Judge Bingham, and all the judges of the Court of Appeals have concurred in finding that down to that date there was no negligence on the part of any of the directors.

Judge Dodge says:—

"That it was not due to any negligence chargeable to the defendant directors that Coleman was enabled to put his method of stealing into operation and to keep it from being detected up to the end of September, 1907, may now be taken as established" (p. 1649).

"Neither the master nor the court below have found, nor does anything in the record indicate, that on or before September 30, 1907, there had come to the notice of the president or of any other directors anything tending to arouse in their minds any suspicion or distrust of the cashier's efficiency, or of the reliability of the books and accounts kept under his supervision" (p. 1655).

The master and the various judges are, therefore, unanimous against many of the contentions which have in the past been made by the receiver, and which reappear in paragraphs (3) *a*, *b*, *c*, *d*, *e*, *f*, and *l*, of the receiver's assignment of errors (pp. 1680–1681) and in various paragraphs of his so-called "Specifications of Negligence" (Receiver's brief, pp. 85–89).

II

SPECIFICATION OF ERRORS RELIED ON.

The appellant, Sumner Dresser, administrator, relies on the alleged errors of the Circuit Court of Appeals in making certain rulings and findings and failing to make others, as set forth in his assignment of errors (pp. 1686-1688). Stated more briefly, it is claimed that the court erred with respect to the following findings and rulings:—

1. That Edwin Dresser was negligent.
2. That Edwin Dresser was liable for all losses from the end of November, 1908, because he took no steps regarding what Fillmore had told him.
3. That the master's finding that Fillmore's statement was not such as reasonably to call for an investigation of the books should be reversed, the court not having the important advantage which the master had of seeing and hearing the witnesses.
4. That charges against Coleman had been seriously made to Edwin Dresser.
5. That Edwin Dresser did not know how Coleman paid for his automobile.
6. That Coleman's ownership of the automobile aroused the suspicions of one Campbell in February, 1909, and should have aroused those of Edwin Dresser.
7. That Edwin Dresser might have learned, by reasonable investigation, of Coleman's frequent trips to New York, and his stupendous losses at faro, of which matters there is no evidence in this record.
8. That Edwin Dresser knew of Coleman's interest in the stock market, and his speculative dealings.

. That Edwin Dresser was negligent in not examining depositors' ledger.

0. That Edwin Dresser was negligent in failing to estigate Coleman because of the decline in deposits in fall of 1909.

1. That Edwin Dresser was liable for the entire losses the bank for the period beginning a month after the versation with Fillmore.

nd in failing to find and rule as follows:—

2. That the cashier had supervision of the bank's em-yees, and that Edwin Dresser, knowing the cashier's d opinion of Coleman, had the right to rely on it.

3. That in any event Edwin Dresser could be held y for losses which were the natural and probable con-uence of his negligence and which ought to have been eseen.

4. That the losses resulting from Coleman's defal-ions were not the natural and probable consequence Edwin Dresser's negligence, even if he were negligent found by the court.

III

ARGUMENT.

A. The Decision of the Courts below against Edwin Dresser is entitled to less Weight than would ordinarily be the Case.

Upon the question of the liability or non-liability of the estate of Edwin Dresser every variety of judicial opinion has been expressed during the progress of the case.

The master alone saw and heard the witnesses and therefore was in a much better position to reach a correct conclusion than were the judges. His report should obviously be given great weight.

While it is true that in a sense both the District Court and the majority of the Circuit Court of Appeals concurred in drawing a different conclusion with respect to the Fillmore warning from that drawn by the master, the circumstances are such that there is no reason for the application of the rule concerning the presumptive correctness of concurring findings made by two courts below.

1. *The only Magistrate who saw and heard the Witnesses—a Matter of unusual Importance in this Case—found for the Defendant.*

The master was "experienced in judicial work" (Brown, J., p. 1666), having formerly served for several years as a justice of the Superior Court, the principal trial court of Massachusetts.

There are unusual reasons why the master's conclusion as to the absence of negligence on the part of the directors, unanimously affirmed as it is by the Circuit Court

of Appeals as to all the directors but Edwin Dresser, should be likewise affirmed as to him.

The fact that the master alone saw and heard the witnesses, always an important consideration, is of much more than usual importance in this case.

One fundamental question being whether the defendants ought to have suspected Coleman of stealing, it is obvious that the appearance of Coleman and his demeanor upon the witness stand, the sort of a man he showed himself to be, were of the greatest significance. For years he worked beside the cashier and the other employees of the bank without arousing a suspicion of his honesty. He came under the frequent observation of the directors and the customers of the bank, was "well-behaved and industrious and courteous and was well liked"; his conduct and bearing were beyond criticism (Brown, J., p. 1668). The skill and coolness with which, while the bank examiner was actually in the bank in December, 1909, although believing detection inevitable, he so doctored his books as to pass the examination, showed that he was a genius in the concealment of his criminality. He was under examination before the master for many days. The master had the fullest opportunity to study his appearance, his personal and mental characteristics, and his capacity for deceit under cover of an attractive and plausible mien. In other words, the master had information of vital importance which the courts have not possessed. Upon the question whether Edwin Dresser was negligent in his treatment of Coleman and in his disregard of circumstances which it is alleged should have aroused his suspicion, Coleman's appearance and general makeup might well be of decisive importance.

So also it is obvious that the appearance of Earl the cashier must have been a material factor in determining

whether Dresser was justified in continuing to rely on the supervision exercised by him.

So as to Fillmore: while the master found that he is a man of "standing and responsibility" and that no reason appeared "to discredit him as a witness" and that his testimony as to the conversation was true (p. 88), nevertheless his general appearance cannot fail to have been significant upon the important question of the weight which under all the circumstances Dresser should have given to what he said.

Furthermore, upon all questions as to which there was a conflict in the testimony the master's judgment as to the credibility of particular witnesses should be accepted.

The Circuit Court of Appeals admits that this is a "close" case (Aldrich, J., p. 1674). That being so, the master's conclusion as to negligence, arrived at in the light of material information of which the courts must necessarily remain ignorant, should not be disturbed.

These considerations appealed strongly to Brown, J.:—

> "The special master, experienced in judicial work, had before him the witnesses in person, and upon this matter, depending so much upon oral testimony and upon the circumstances under which Fillmore's statement was made, found no negligence. I am of the opinion that this finding of the master should stand. . . .
>
> How far Fillmore's grounds of suspicion of a theft were the basis of the advice to look after Coleman, and what weight Dresser should have attached to Fillmore's suspicion of theft and of Coleman as a thief, were questions peculiarly for a master who heard the oral testimony; as was also the question of what weight Dresser should have attached to the accompanying statement of Fillmore's belief that 'he is living a pretty fast pace,' and of his 'pretty good authority that he is supporting a woman' " (pp. 1666-1667).

"How far Dresser's own knowledge of Coleman, and his judgment from personal observation of Coleman, justified him in attaching no weight to Fillmore's suspicions is especially a question of fact upon which the master, who had Coleman under close observation as a witness, as he did also the other witnesses who testified as to Coleman's conduct, was much better qualified than judges who have only a printed record. That Dresser had complete confidence in Coleman is manifest. That this confidence was not in fact disturbed by Fillmore's statement is manifest. Should it have been? Our own knowledge of men constantly leads us to discredit and instantly reject rumors and suspicions concerning them. There is no rule of law that determines when it is reasonable and when it is unreasonable to do so. The master has found in favor of Edwin Dresser upon this point.

The practical rules which determine the weight to be attached to a master's report are especially applicable on just such a question as this, and for sound reasons weigh heavily in favor of this defendant" (p. 1669).

The statement made by Mr. Justice Holmes in *Adamson* v. *Gilliland,* 242 U. S. 350, 353, is applicable here:—

"The case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

For certainly, in a case where the finding of the master depends so much as it does here on his judgment concerning the personality, characteristics, and apparent reliability of certain of the witnesses, and concerning the impression which they may reasonably have made on others, the opportunity to observe the witnesses upon the stand

is at least as important as where it is a mere question of credibility.

And see *Tilghman* v. *Proctor*, 125 U. S. 136, 149.
Kimberly v. *Arms*, 129 U. S. 512.
Camden v. *Stuart*, 144 U. S. 104, 118.
Davis v. *Schwartz*, 155 U. S. 631, 636.

2. *The Judges of the Circuit Court of Appeals all agreed with the Master and disagreed with the District Court on nearly every material Point, and one of them on every Point.*

The rule that concurrent findings of the two courts below will not be disturbed unless manifestly erroneous cannot be successfully invoked by the receiver as against the estate of Edwin Dresser.

In the first place, except in so far as two of the judges of the Court of Appeals agreed with Judge Bingham (disagreeing at the same time with the master and with Judge Brown) that Edwin Dresser should have taken action because of the Fillmore conversation, there was no concurrence as to any vital point in the case. The Circuit Court of Appeals reversed Judge Bingham as to every other substantial conclusion which he arrived at. Secondly, it is submitted that the rule is not applicable to a case where the alleged "findings" are merely opinions as to whether certain facts, concerning which there is no substantial dispute, warrant the inference of negligence, and are necessarily involved with rulings of law as to the scope of the duty incumbent upon the person charged with negligence. Thirdly, it is further submitted that the rule is not applicable to mere conclusions as to negligence where the appearance of the witnesses is so material a factor as here, where neither court saw them, where the master who did see them came to a different

conclusion, and where that conclusion is concurred in by one of the judges of the appellate court. Finally, in any event, the conclusion as to the effect of the Fillmore incident was, as will later be pointed out, "manifestly erroneous" (see pp. 88 *et seq., infra*).

Even as to the Fillmore warning, there was no real concurrence between the District Court and the two judges of the Circuit Court of Appeals. Before coming to the Fillmore warning at all Judge Bingham had already decided that all of the directors were liable for the losses accruing from a much earlier date because of their alleged negligence in failing to examine the books on September 30, 1907 (pp. 208–209). Consequently the finding as to the Fillmore incident is altogether of secondary importance and of no real moment at all. It did not lead to the imposition of any greater liability on Edwin Dresser. It did not affect the result at all so far as Edwin Dresser was concerned, nor did it lead to any differentiation in the result as between him and the others. With the majority of the Circuit Court of Appeals, on the other hand, it was the decisive factor in the case and led to the imposition of extraordinary liability upon Edwin Dresser alone.

Furthermore, there were marked differences between the conclusions of the District Court and those of the two judges of the Court of Appeals with reference to the Fillmore incident, and with reference to various subsidiary matters having an important bearing on the effect to be given to that incident.

(*a*) Thus the District Court found Edwin Dresser negligent in failing to report to the directors the Fillmore letter as well as the conversation (p. 209), whereas the Court of Appeals found negligence with respect only to the conversation (p. 1661).

(*b*) Judge Bingham's statement that "Fillmore . . . *told* Dresser about Coleman's conduct" (p. 209), an entirely unwarrantable characterization of the conversation, was not repeated by the Court of Appeals. As Judge Brown says, the Fillmore statements were "not of facts, but of suspicions" (p. 1668).

(*c*) The Circuit Court of Appeals found that at the time of the Fillmore warning Coleman was being "trusted in positions affording greatly enlarged opportunities for stealing" (p. 1659). The District Court made no such finding, but on the contrary emphasized the fact that "after November, 1907, when Paul became teller, Coleman had nothing to do with the actual handling of the cash or securities" (p. 192), although he had previously had access to them.

(*d*) The Court of Appeals in effect finds that in the fall of 1908 Dresser knew that Coleman was "interested in the stock market" (p. 1658). This is entirely unwarrantable, as will be hereafter shown, and the District Court made no such finding, but merely stated that there was "*evidence* that Coleman . . . frequently spoke to Mr. Edwin Dresser about stocks" (p. 205). It is true that there was such evidence, but, as will be later pointed out, it was so flimsy that it cannot possibly justify the court in reversing the master's finding that Edwin Dresser was completely ignorant of the matter, and the District Court did not undertake to reverse that finding.

(*e*) The District Court found that "Mr. Edwin Dresser knew that Coleman took charge of the checks coming from the clearing house," and that Earl testified that "Dresser repeatedly saw Coleman handling the clearings" (p. 206). The Circuit Court of Appeals did not so find, and such a finding is totally unjustified in the face of the master's conclusion to the contrary (p. 80), which is in accordance with all the testimony and hardly to be

reversed because of this statement made by Earl: "I don't know that any one of them knew about those things except perhaps that Edwin Dresser had seen it going on, but I don't know that he paid any particular attention to it" (p. 325). There is no other evidence of knowledge on Dresser's part. Counsel for the receiver admit that he did not have knowledge of the matter (Receiver's brief, p. 78).

Furthermore, Judge Bingham drew his conclusion as to the importance of the Fillmore warning in the light of altogether erroneous views as to the extent of the duties incumbent on bank directors with respect to details of management, views which the Circuit Court of Appeals unanimously repudiated as calling for "the application of a standard of diligence more exacting than any heretofore applied in the case of national bank directors" (p. 1653) and requiring of them measures "of unusual precaution, not imperative when there was no reason to distrust the integrity or efficiency of the cashier" (p. 1654).

The majority of the Circuit Court of Appeals, in their turn, came to their conclusion as to the Fillmore incident in the light of various erroneous findings and rulings hereinafter dealt with in detail (see pp. 101–124*infra*).

The lack of concurrence between the decision of the District Court and that of the Circuit Court of Appeals is expressly referred to and emphasized by the latter court in its opinion on the motion to amend the decrees, wherein Judge Aldrich says that the mandate of the Court of Appeals is "based upon different facts and different findings than those involved in the first decree of the District Court" (p. 1674) and that consequently interest should not be allowed. It is significant, too, that Edwin Dresser, as well as the other appellants, was allowed his costs of appeal (p. 1665).

B. THAT A MERE BOOK-KEEPER SITUATED AS COLEMAN WAS COULD ROB THE BANK AS HE DID WAS NOT REASONABLY TO HAVE BEEN EXPECTED BY THE DIRECTORS.

That Coleman, throughout the period of his stealings except during the beginning, was a mere book-keeper, having nothing to do with the handling of the cash or securities of the bank, that he never had anything to do with the lending of the bank's money, that he was directly under the eye at all times of an honest cashier who so far as was known was entirely competent, and that Coleman's methods of stealing were unique and so successfully concealed that his criminality was not suspected either by the cashier or by the bank examiners, are facts of vital importance upon the issue of negligence.

The wrecking of banks is ordinarily caused by improper loans by the president or the cashier or by embezzlement on the part of the latter. Thefts of minor importance by tellers who have access to the cash are not uncommon, but that a mere book-keeper in a small bank of four employees, without access to the cash, supervised at all times by an experienced cashier who worked at his elbow day by day and year after year, should succeed in stealing a large part of the assets of a bank was unheard of before this case. There is nothing like it in the history of bank defalcations or in the cases which have come before the courts.

Accordingly, in considering whether Dresser was negligent in disregarding the sidewalk conversation of Fillmore, as well as in passing generally upon his negligence, it must be borne in mind at all times that *no one* in Dresser's situation, knowing Coleman's position in the bank, the surveillance to which he was subjected, the fact that his work was supposed to be checked up constantly by the cashier and the apparent lack of any opportunity

to steal money, would for one moment have suspected the possibility of his doing what he did.

Not only were Coleman's methods ingenious,—they were absolutely novel; and there was nothing to have led one to anticipate them or to believe that any system of stealing which he could originate could escape discovery by the cashier or the bank examiners. The position taken by the receiver is that Coleman's method required "a careless cashier and could not possibly have operated without one" (Receiver's brief, p. 129).

The master finds:—

> "This method of stealing and making the cashier of the bank an unconscious instrument to perfect the fraud is, as was agreed by all counsel and testified to by the bank examiners at the hearing, unique and required no confederate to act in collusion with the thief" (p. 41).
>
> "There was no way, apparently, by which a mere bookkeeper could draw money from the bank or its depositories, except possibly by forgery, which would soon have been exposed. Mr. Earl was not in collusion with anybody and believed that he held the funds safe. Only he or the teller could pass it out over the counter, and only then upon a check presented at the counter. Only the president or Mr. Earl could draw money from the National Shawmut by check" (p. 91).
>
> "If Coleman had not so testified, it would have been difficult—if not almost impossible, to my mind—to have discovered how the money was taken" (pp. 91–92).

The Circuit Court of Appeals says:—

> "The methods whereby he accomplished and concealed his thefts are set forth in the opinion below and need not be here restated in detail. They were ingenious and appear to have been altogether novel" (p. 1648).
>
> "In view of the subtlety of the wrong-doer's system for covering and concealing his speculations and embezzle-

ments, we are also unable to accept as clearly warranted by the evidence the conclusion reached by the District Court that due diligence on the directors' part in comparing the bank's assets and liabilities with the cashier's ledger would have resulted in discovery by them of the discrepancies" (p. 1655).

Judge Brown's statements in this regard in his dissenting opinion cannot be controverted:—

> "This case presents the remarkable feature that there was no reasonable cause for apprehension that a bank could be reduced to a mere shell by the unprecedented method adopted by Coleman. It is also remarkable in that the causes which led to such large misappropriations by Coleman were in a great part equally outside the bounds of reasonable anticipation" (p. 1671).
>
> "That Coleman, a book-keeper constantly under the supervision of a cashier, and whose fidelity bond was fixed at the sum of $5,000, as a reasonable measure of the risks incident to his position, would have either the opportunity or the temptation to do what the appellee's brief characterizes as 'the seemingly impossible,' was far outside the bounds of reasonable foresight" (p. 1672).

It must be remembered that Coleman was the "son of a reputable father who was engaged in business in Cambridge and who was a man of some financial standing" (p. 78) and that he lived at home; that he was always well-behaved in the bank, industrious and courteous, well liked by all and that his conduct was "always above criticism" (p. 78); that as messenger he had on various occasions been intrusted with large amounts of cash which he had safely carried to the bank in Boston (p. 337); that while he was teller there was no evidence of trouble with his cash (p. 77).

The master goes on to say:—

> "From January, 1904, until sometime in 1907 he did it [the work on the depositors' ledger] and did it correctly. His daily results coincided with Mr. Earl's, and until he devised a way to deceive, there had been a long-continued and regular course of proceedings that had bred confidence in him on the part of Mr. Earl" (p. 91).
>
> "The length of time that Coleman had done his work correctly, the fact that he was not entrusted with the handling of any money, and the apparent impossibility of his being able to steal, I find make a combination of conditions and circumstances that relieve [Earl] from a charge of negligence" (p. 96).

Not only did Coleman never arouse suspicion on the part of Earl, but his criminality escaped detection by the various clerks who worked on his ledger in his absence and no indication of it attracted the attention of the successive bank examiners.

The great difficulty is in putting one's self in the position of the president and directors and viewing conditions as they must have appeared to them rather than in the light of what has since been discovered after a protracted investigation.

The Circuit Court of Appeals emphasizes this point in dealing with one phase of the case:—

> "The court had before it the result of six months' scrutiny of both ledgers by an expert accountant, who had also examined in connection with them everything found in the bank's books and papers which could assist him in tracing Coleman's dealings with the depositors' ledger in his constant efforts to prevent the entries thereon from showing the shortages caused by his thefts. By the aid of these results the importance of determining the true amount of the columns and footings in the depositors' ledger referred to by the court, and how to select and follow the significant

columns and footings in order to accomplish such determination had then been made clear. But we are not satisfied under the peculiar circumstances of the concealment that it is reasonable to find, or to assume as clearly and unmistakably established, that the directors, acting as they would have had to act on September 30, 1907, without the aid of any of the knowledge obtained after the event and not prompted to exceptional methods of investigation by any reason to believe them necessary, would have discovered for themselves the important thing to be done, and accomplished it with success. We agree with the master that the depositors' ledger—

> 'is a difficult book to follow and one in which a person not thoroughly familiar with it and used to handling it would not be likely to readily detect error' " (p. 1655).

Having in mind the fact that Coleman's method was dependent on (1) the cashier's drawing his check for the clearing house without looking at the checks to be paid by it, and (2) on Coleman's false entries escaping detection at the daily and semi-weekly checkings and on the constant occasions when the cashier or the teller examined his ledger, it may be said with confidence that no one would have foreseen that such a scheme could be worked successfully for a single week.

C. The Decisions show that "a Liability of this Kind should not be lightly imposed in the Absence of any Element of Positive Misfeasance."

In the present suit the plaintiff does not rely upon any alleged violation of the National Bank Act, but contends that the defendants are liable because of supposed neglect to take the precautions which it was incumbent upon

them to take in order to guard the bank against loss. The question which underlies all the others presented by the case is, therefore, just what attention the directors of a bank are bound to give to its affairs.

Briggs v. *Spaulding,* 141 U. S. 132, is the leading case on this subject. In that case the loss arose from improper loans and misappropriation of the bank's funds by the acting president. It appeared that for fourteen years the directors had, except on special occasions, held no meetings other than the annual meeting and meetings to declare dividends; no committees had ever been appointed to examine into the bank's affairs, although a by-law required that such a committee should be appointed every three months; neither had the directors made any attempt to examine the books of the bank or to ascertain the collectibility of the loans. As against four of the seven directors the case was disposed of on grounds not material for the present purpose. As determining the liability of the remaining directors (Spaulding, Johnson, and Francis E. Coit), Chief Justice Fuller laid down the following principles:—

> "It is perhaps unnecessary to attempt to define with precision the degree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents" (p. 147).

"Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part" (p. 151).

"The turning point, so far as defendants Spaulding and Johnson are concerned (and we include with them Francis E. Coit) is whether under all the circumstances they were guilty of negligence, producing any of the losses in question, not affirmatively, but because they did not prevent them; and this depends upon whether they should have made an examination of the books and assets of the bank, and whether, if they had, that would have enabled them to discover such a condition of affairs as would have resulted in placing the bank in liquidation, and whether thereby some of the losses would have been averted.

"Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention" (pp. 165–166).

The Chief Justice takes it for granted that the measure of a director's liability in such a situation is similar to that applicable to a gratuitous bailee, referring (at p. 150) to *Preston* v. *Prather,* 137 U. S. 604, in which it was held that "gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negli-

gence in its keeping," and quoting with approval (at p. 148) the remarks of Sharswood, J., in *Spering's Appeal,* 71 Penn. St. 11 (at p. 20) :—

> "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee entrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more" (p. 148).

The Chief Justice further declared (at p. 162) that "it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption," also that "knowledge of what the books and papers would have shown [is not] to be imputed."

Upon an extended examination of the evidence in the light of these principles, the court reached the conclusion that the three directors above named were not liable.

The only subsequent case in this court dealing with the liability of national bank directors for common-law negligence is *Bowerman* v. *Hamner,* 250 U. S. 504. In this case a director was held liable under the principles stated in *Briggs* v. *Spaulding,* but the facts were so different from those in the case at bar that the decision has little bearing on the questions now under consideration. It appeared that the defendant during a period of more than five years never attended a directors' meeting or made any attempt to inform himself as to the condition

of the bank, although he had reason to believe that its affairs were being mismanaged. Hence it was almost too plain for discussion that he was liable for losses resulting from gross irregularities on the part of the president and cashier which he could not have failed to discover if he had exercised the slightest care.

The most important federal decision pertinent to the present case since *Briggs* v. *Spaulding* is *Warner* v. *Penoyer,* 91 Fed. Rep. 587 (C. C. A. 2d Circ.) hereinafter referred to.

(1)

As will be seen from the foregoing quotations, the fundamental principle upon which the decision in *Briggs* v. *Spaulding* proceeds is that the liability of a director is very different from that of a private trustee and is more nearly analogous to that of a gratuitous bailee, who is not accountable for a loss unless this resulted from his failure to take some precaution the necessity for which would have been apparent upon the least consideration. In other words, a director is liable only when the loss results from his *"gross inattention"* to his duties, to adopt the phrase used by Chief Justice Fuller in the passage quoted on page 44. This, in substance, is the rule laid down by the House of Lords in a case which has often been cited.

Overend & Gurney Co. v. *Gibb,* L. R. 5 E. & I. App. 480. Lord Hatherley, L. C., said (at p. 486) :—

> "The Vice-Chancellor stated (in which I entirely agree with him) that these gentlemen . . . simply acted in the execution of what they believed to be their duty, however mistaken they may now appear to have been in the view they took. That is, of course, a very great step towards the solution of the question one has to investigate; because

the question is then simply reduced to this,—whether or not the directors exceeded the powers entrusted to them, or whether if they did not so exceed their powers they were cognizant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into? Was there *crassa negligentia* on their part which, though not charged in words, is, it is argued, shown by the facts, so that they should be fixed with the loss of the fund entrusted to their hands for the purpose of making the acquisition of the business; was the acquiring of that subject-matter through the medium of those funds, with the amount of knowledge which the directors had attained, an instance of *crassa negligentia?*"

The doctrine of *Overend & Gurney Co.* v. *Gibb* has often been applied by American courts, as, for example, in a series of decisions by the Court of Appeals of Maryland, in one of the latest of which the court said:—

"When the acts of the appellees [directors of a corporation known as the 'Fraternal Savings Association'] are considered in the light of the situation and conditions in which they were placed, while it may be said that they were unwise, indiscreet and inefficient in the management of the association, and were guilty of some negligence, we do not find that they were guilty of *such gross or culpable negligence* . . . [as] must clearly be shown, before they can be held personally liable."

Foutz v. *Miller,* 112 Md. 458 (at p. 463).

Another statement of the rule by a high authority is that by Chancellor Runyon in *Citizens Building, Loan & Savings Association* v. *Coriell,* 34 N. J. Eq. 383 (at p. 392):—

"These directors served without pay. They were selected by their fellow stockholders to manage gratuitously the

affairs of the association in which they and the other stockholders were jointly interested. To apply to them the strict rules which are applicable to trustees who assume the discharge of the duties of private trusts, would be unjust. In the absence of fraud, and where they have neither derived, nor expected to derive, any profit, benefit or advantage from their management which was not common to the other stockholders; when they have acted fairly, and have not been guilty of gross neglect or gross inattention, they should not be held liable. The rule applicable to mandatories is sufficiently stringent for such cases, and is a reasonable one. They should be held liable only in case of fraud, gross negligence or misuser."

Again, in *North Hudson Mutual Building & Loan Association* v. *Childs*, 82 Wis. 460, the court said (at p. 476):—

"In respect to directors or those acting *ex officio* as such, the rule of liability has been the subject of much discussion in the recent case of *Briggs* v. *Spaulding*, 141 U. S. 132, in which, although there was a strong dissent, the rule may be regarded as settled, in the federal courts at least and in the courts of several of the states, as there laid down, and to the effect that directors, although often called 'trustees,' are not such in any technical sense, but that they are mandataries, the relation between them and the corporation being rather that of principal and agent, but under the circumstances they may be treated as occupying, in consequence of the powers conferred on them, the position of trustees to *cestuis que trustent;* that the degree of care required of them depends upon the subject to which it is to be applied, and each case is to be determined upon its own circumstances; that, as they render their services gratuitously, they are not to be held to the degree of responsibility of bailees for hire, or expected to devote their whole time and attention to their duties; that they are not, in the absence of any element of positive misfeasance, and solely on the

ground of passive negligence, to be held liable, unless their negligence is gross or they are fairly subject to the imputation of a want of good faith. It is to be remembered that they have the same interests to protect and subserve as other stockholders, and self-interest naturally prompts them to look after their own, and the degree of care they are bound to exercise is that which ordinarily prudent and diligent men would exercise under similar circumstances in respect to a like gratuitous employment, regard being had to the usages of business and the circumstances of each particular case; that they are not liable, in the absence of fraud or intentional breach of trust, for negligence, mistakes of judgment, and bad management in making investments on doubtful or insufficient security. Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence. Were a more rigid rule to be applied, it would be difficult to get men of character and pecuniary responsibility to fill such positions."

In the recent case of *Bailey* v. *Babcock,* 241 Fed. Rep. 501 (D. C. W. D. Pa.) it was held, in accordance with these authorities, that directors of a national bank were not liable for using the funds of the bank to finance a lumber business which turned out disastrously, for, while the undertaking might have been *ultra vires,* it was not clearly so and, although the result showed that the plan was ill-conceived, it was entered upon in good faith to promote the interests of the bank. The court cited with approval *Swentzel* v. *Penn Bank,* 147 Penn. St. 140, in which case Paxson, J., said (at p. 150) :—

"It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatory. His principal business at the

bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods—generally once or twice a week—for an hour or two. The condition of the bank is then laid before him, in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank, in which he participates. The cash on hand is counted, the bills receivable and sureties examined, to see whether they correspond with the statement as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials who are paid for such services, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business, is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank, doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs."

In *Bailey* v. *Babcock* the court further pointed out the importance of the fact that, as in the case at bar, the directors were stockholders and vitally interested in the welfare of the bank and adopted the following language used by Sharswood, J., in *Spering's Appeal,* 71 Penn. St. 11, 21:—

"As the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill."

(A)

Two subordinate propositions which follow from the general rule adopted in *Briggs* v. *Spaulding* have received general recognition. The first is that, unless there is some unusual reason for suspecting irregularities, the directors of a bank are under no obligation to examine or verify the books and accounts and may rely upon the cashier's supervision of these matters.

Thus, in *Warner* v. *Penoyer,* 91 Fed. Rep. 587, the Circuit Court of Appeals for the Second Circuit considered the liability of the directors of a small national bank for losses caused by improper loans and overdrafts which the cashier concealed by a system of false entries. It appeared that the directors exercised almost no supervision over the cashier and accepted his statements of the bank's condition without question, never attempting any independent investigation. It was nevertheless held that no liability was established except on the part of those directors who were members of the examining and discount committees and who failed to perform the duties which were imposed upon those committees by express votes of the board. Judge Wallace said (at p. 591) :—

> "It is manifest that the directors in this case relinquished almost untrammeled control of the bank to the cashier, and that their supervision over its affairs was so superficial as to be hardly more than perfunctory. But we are not satisfied that actionable negligence is imputable to them, collectively or individually, were it not found in their laxity of supervision over the discounts. They might have required periodical examinations of the books to be made by experts. They might have insisted upon verifying, by personal investigation from time to time, such details of

the bank's condition as they ought to have known before declaring dividends, or as were required to be reported to the comptroller of the currency. And, if they had done so, this falsification of entries and accounts would probably have been discovered, if not prevented. But these would have been measures of unusual precaution, not imperative when there was no reason to distrust the integrity or efficiency of the cashier. They are not to be deemed remiss because they did not resort to exceptional methods, or because they relied on the cashier's supervision over the books and accounts, or because they reposed confidence in his reports of the amount and other clerical details of the assets and liabilities. They were under no duty to observe the extraordinary vigilance short of which a bank cannot be protected from the crimes conceived by a dishonest cashier. The systematic surveillance observed in large banks, especially in city banks, is not customary in the small village banks; and, in considering their conduct, we are at liberty to assume that the bank was visited and examined from time to time by those officers whose statutory duty it is to make a thorough investigation into all the affairs of such institutions and a full and detailed report to the comptroller of the currency."

Another important case is *In re National Bank of Wales,* [1899] 2 Ch. 629, affirmed *sub nom. Dovey* v. *Cory,* [1901] A. C. 477. The object of this suit was to fasten liability upon a bank director who consented to the making of loans and the payment of dividends which subsequent events disclosed as improper. It had been customary for reports from the numerous branches of the bank to be laid before the directors at each meeting but, because of the mass of detail presented by these reports, the directors had never made any attempt to examine them personally but had relied on the statements of the manager as to what the reports showed. It was nevertheless held that no liability was made out. In the Court

of Appeal, Lindley, M. R., said ([1899] 2 Ch. at p. 573) :—

"Was it his [the director's] duty to test the accuracy or completeness of what he was told by the general manager and the managing director? This is a question on which opinions may differ, but we are not prepared to say that he failed in his legal duty. Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest business men."

In the House of Lords the Earl of Halsbury, L. C., said ([1901] A. C. at p. 485) :—

"The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labor impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have

discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management."

Lord Davey said ([1901] A. C. at p. 492) :—

"I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *Hallmark's Case*, 9 Ch. D. 329, and by Chitty J. in *In re Denham & Co.*, 25 Ch. D. 752, that directors are not bound to examine entries in the company's books."

This decision was in line with a series of earlier English cases.

Land Credit Co. v. *Lord Fermoy*, L. R. 5 Ch. 763.

Grimwade v. *Mutual Society*, 52 L. T. R. (N.S.) 409.

London Financial Association v. *Kelk*, 26 Ch. D. 107.

In re Denham & Co., 25 Ch. D. 752.

In the case last cited, Chitty, J., said (at p. 766) :—

"No man is bound to presume a fraud; and, as Lord Hatherley said in the case of *Land Credit Company of Ireland* v. *Lord Fermoy,* L. R. 5 Ch. 772, 'whatever may be the case with a trustee, a director cannot be held liable for being defrauded; to do so would make his position intolerable.' It is sufficient if directors appoint a person of good repute and competent skill to audit the accounts and have no ground for suspecting that anything is wrong. The directors are not bound to examine entries in the company's books."

Dovey v. *Cory* has been followed by the Judicial Committee of the Privy Council in the case of *Prefontaine* v. *Grenier,* Q. R. 15 K. B. 143; affirmed [1907] A. C. 101. In delivering the judgment of the Judicial Committee, Sir Arthur Wilson said ([1907] A. C. at p. 109) :—

"In this country questions as to the nature and extent of the duty and responsibility of directors and others, in respect of the conduct of the affairs of companies, have been frequently under consideration. Attempts have repeatedly been made to render them personally liable, on the ground that they have trusted the regularly authorized officers of the company; that they have failed to detect, and been misled by, misrepresentation or concealment by such officers, when there was no reason for doubting their fidelity. But such attempts have not been successful. It is sufficient to refer to the case of *Dovey* v. *Cory,* [1901] A.C. 477, in which the subject was fully considered by the House of Lords.

"Their Lordships think that in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, and in the absence of any evidence of custom and course of business to the contrary, the Court of King's Bench was right in accepting the English rulings, because they were based, not upon any special rule of English law, nor upon any circumstances of a local char-

acter, but upon the broadest considerations of the nature of the position and the exigencies of business."

The paragraph last quoted is a conclusive answer to the suggestion of counsel for the receiver (Brief, p. 109) that the English decisions are affected by the requirement of the English statutes concerning examinations by chartered accountants and are therefore not to be relied on in this country.

The decisions of the state courts, likewise, show that it is not incumbent upon the directors of a bank to examine the books or to make other detailed investigation which is properly the work of an accountant or bookkeeper, in the absence of unusual circumstances charging them with notice that a searching examination would be likely to disclose irregularities. This point was discussed at length in *Savings Bank of Louisville* v. *Caperton*, 8 Ky. 306, a case many times cited. In the course of the opinion, the court said (at p. 318) :—

"If it was the duty of the directors to examine the books of the bank in the absence of any reason for suspecting the honesty of the bank's cashier, with a view of testing their correctness with the weekly statements made them, or when making their periodical investigation of the money on hand, and the notes, bills and bonds belonging to the bank—it being manifest that the frauds could have been easily discovered at least by a book-keeper of ordinary intelligence—their responsibility would necessarily follow. It is difficult to define each and every duty pertaining to such a position, but we are satisfied that a bank director is neither required to be an expert, or a competent book-keeper, or do more in the general management of the bank, with reference to its cashier and book-keeper, than to see, in the absence of any reason for doubting his fidelity to the trust confided to him, that the weekly, daily or monthly

statements made to the board correspond with the general balances upon the books. In this case the weekly statements as to the cash on hand, bills discounted, etc., corresponded with the cash account as it appeared each day, or at the time the statement was made, with the cash account on the teller's blotter, where, as in this case, the cash account was kept. It is argued, however, and the expert so states, that these frauds could have been readily detected by comparing a balance on the individual ledger with the amount stated to be due depositors in Rhorer's weekly statements. It is plain that any director, if at all conversant with book-keeping, could have gone to the individual ledger, and running over the accounts of depositors, and then comparing that with the blotter ending each day's transactions, could have discovered the fraud; or it might have been discovered by ascertaining the amount due each depositor, as appeared from that book; but we know of no rule of law or reason that would require such an investigation by directors, and to hold them responsible for failing to discharge such a duty would be imposing a responsibility that no business man would assume, without a compensation commensurate with the labor required.

"If they have selected a cashier and book-keeper, regarded at the time as qualified for the position assigned, or used reasonable care and precaution in making the selection, and taken from him a bond in an adequate penalty for the faithful discharge of his duties, his weekly or daily statements, as the custom of banks may be, agreeing with the balances as found on his books, connected with the periodical count of the money, notes, bonds, etc., is all the supervision required, unless the directors have some cause for suspecting, or see that he is neglecting his duties."

So, in *Mason* v. *Moore*, 73 Ohio St. 275, the court said at (p. 296) :—

"The directors of a bank are surely authorized to appoint a cashier conferring upon him the powers usually exercised

> in such an office. He is properly confided in as to the custody of its money, securities, books and valuable papers and the supervision of its books and accounts. While it is true, that the directors cannot divest themselves of the duty of general supervision and control, they may properly intrust to him the powers usually appertaining to the direct management of the business, and where they have acted in good faith and with ordinary diligence in their general supervision, they are not liable for losses resulting through secret peculations and secret false entries of the cashier. Their position does not require them to devote themselves to the details of the business, which may be left to the clerks and book-keepers under the supervision of the cashier. They are not required to look with suspicion upon the conduct of these agents or employees."

While it is now settled that directors are liable for violations of the National Bank Act only when they have acted "knowingly," the effect of the decision in *Thomas* v. *Taylor,* 224 U. S. 73, is to make the test of liability in such a case so nearly the same as the test in a suit based upon alleged common-law negligence that the following passage from the opinion of the court in *Jones National Bank* v. *Yates,* 240 U. S. 541 (at p. 557), is pertinent to the case at bar:—

> "As to the financial condition of the bank, there is no room for controversy. It would be difficult to conceive of a case of more scandalous maladministration than that which the testimony portrays. There was evidence of manipulation of accounts, of fictitious and falsified entries of fraudulent concealments. It cannot be said that there was serious effort to meet this evidence. There was no attempt to palliate the offences which it appeared had been committed by the executive officers in the conduct of the bank's affairs. But these directors were not accountants; presumably they relied upon the books as containing accurate items, and there is no basis for the conclusion that

they had knowledge of fictitious or falsified entries in the books, or of the fraudulent transactions which such entries were intended to conceal and which were revealed after the bank failed. With respect to such concealed transactions, we find nothing to show that the directors knowingly participated in, or assented to, a violation of the statute."

(B)

The second corollary to the doctrine of *Briggs* v. *Spaulding* is that directors are entitled, in the absence of substantial evidence to the contrary, to proceed on the assumption that the bank's employees are honest and not to subject them to a system of espionage.

Thus, in *Scott* v. *Depeyster,* 1 Edw. Ch. 513, McCoun, V. C., said (at p. 541), in language quoted by Chief Justice Fuller in *Briggs* v. *Spaulding,* 141 U. S. at p. 162:—

"I know of no law which requires the president or directors of any monied institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason."

So, in *Warner* v. *Penoyer,* 91 Fed. Rep. 587, the court said (at p. 590):—

"They [*i.e.,* the directors of a bank] are not required to adopt any system of espionage over their cashier, or any of their subordinate agents, or to entertain suspicion without some apparent reason, and, until some circumstance transpires to awaken a just apprehension of their want of integrity, have a right to assume that they are honest and faithful."

Again in *Mason* v. *Moore,* 73 Ohio St. 275, the court said (at p. 297) :—

> "The directors of a bank . . . are not required . . . to practise a system of espionage over the cashier or his subordinates, without apparent reason, and they have a right to assume they are honest and faithful, where no circumstances transpire to excite doubt and suspicion."

Even though the directors know that the cashier has been speculating in stocks, this does not necessarily make it their duty to have any unusual examination instituted, as circumstances may justify them in not regarding the speculations as evidence of dishonesty. In the same way, directors are not as matter of law bound to go behind the cashier's statement that money which he is spending with apparent extravagance comes from legitimate sources.

Ricker v. *Hall,* 69 N. H. 592.

Neither are the directors bound to cause an examination to be made out of the regular course merely because of vague suggestions that something may be wrong. This principle was followed in disposing of one of the points urged by the plaintiff in *Prefontaine* v. *Grenier,* [1907] A. C. 101, Sir Arthur Wilson saying (at p. 111) :—

> "A special charge of negligence was pressed against the defendant in the argument of the appeal, based upon the evidence of a M. Gagnon, who held the post of inspector under the bank.
>
> "There is nothing in the evidence to show the terms of his appointment, and no formal definition of the extent of his duties. The defendant said in his evidence that Gagnon's duties were limited to the inspection of branches and agencies outside the city of Montreal. On one occasion

Gagnon was specially employed to examine into a matter in the head office. He says he was dissatisfied with what he found, and that he pressed upon the defendant that he, Gagnon, should be empowered to make a completer inspection. He says that his suggestion was not very well received, that the defendant rejected the idea that the inspector should be put to supervise the work of the head official of the bank.

"It was contended that the omission to authorize the suggested inspection was an act of negligence on the part of the defendant, and that if the suggested inspection had been carried out the overdrafts which led to the fall of the bank would, or might have been, brought to light. Their Lordships are not prepared to say that there was negligence in omitting to sanction an inspection inconsistent with the ordinary method of conducting the affairs of the bank, nor has it been shown that there was any direct connection between the matters excepted to by Gagnon and the fatal overdrafts."

(2)

The fact that Edwin Dresser was president of the bank as well as a director does not render these rules any less applicable in his case. In the absence of an express vote or well-established usage, the president of a national bank has no greater powers or responsibilities than the other directors, except as he is the presiding officer at meetings of the board and of the stockholders and is charged by statute with certain specific duties which are of no consequence in this case. With relation to the other directors the president is simply *primus inter pares*. He is president *of the board,* as is shown by the provision of the statute respecting the manner in which the office shall be filled (Rev. Stats. § 5150) :—

"One of the directors, to be chosen by the board, shall be the president of the board."

Nothing in the statutes lays upon the president any peculiar duty with regard to the matters involved in the case at bar. The very limited nature of the obligations imposed upon him by the National Bank Act was stated as follows in a case presenting the question how far the president of a national bank was charged with the duty of preventing a depositor who was indebted to the bank from withdrawing his deposit:—

> "In respect to the third count, we observe that the statute, section 5130, clause seven, places the conduct of the business of banking associations with its board of directors or its duly authorized officers or agents. Section 5145 provides that the affairs of each banking association shall be managed by not less than five directors to be chosen by the shareholders. It is alleged in this count that the defendant was the president and one of the directors of the association. But he was only one of at least five directors. The only duties imposed on him as president were to certify payments on the capital stock of the association, sec. 5140, to cause to be kept in the office where the business of the association was transacted a list of the shareholders, sec. 5210, and to verify by his oath the general reports made by the association to the comptroller of the currency, sec. 5211, and the reports of dividends declared, sec. 5212. It is nowhere averred in this count that the defendant was the duly authorized officer or agent of the association, whose duty it was to look after the accounts of depositors, to apply the sums standing to their credit to the payment of their obligations to the association, or to prevent the withdrawal or transfer of their deposits while they continued indebted to the association, or that he was even charged with a general superintendence of the affairs of the association. Until it is shown that some officer or agent of the bank was duly authorized to take charge of this branch of the business of the association, the presumption is that it was the duty of the board of directors, and if such was the fact, the defendant was powerless

to prevent the transfer of the deposits of Alfred M. Britton to the credit of the City National Bank of Fort Worth."

United States v. *Britton,* 108 U. S. 193, 197.

This decision simply applies to national banks the rule stated many years before by Gibson, J., as to banks generally:—

"The president [of a bank] . . . is nothing more than the presiding director."

Baird v. *Bank of Washington,* 11 S. & R. 411, 415.

The following cases are a few of the many in which the same principle has been developed and in which it has been shown that the president of a bank has *prima facie* almost no executive functions.

Putnam v. *United States,* 162 U. S. 687, 713.
Commercial National Bank v. *First National Bank,* 97 Tex. 536, 543.
First National Bank v. *Lucas,* 21 Neb. 280, 285.
Montgomery Bank & Trust Co. v. *Walker,* 181 Ala. 368, 380.

On the other hand, the cashier of a bank is ordinarily its chief executive, and all matters connected with the details of its business, including the supervision of the employees and of the books, are properly intrusted to him. Thus, in *Merchants National Bank* v. *State National Bank,* 10 Wall. 604, this court said (at p. 649):—

"The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers.

Where the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office.

The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged."

So, in *Warner* v. *Penoyer,* 91 Fed. Rep. 587, the court said (at p. 590):—

"The directors of a national banking association are authorized to appoint a cashier, and delegate to him all the usual powers of such an office, including the discounting of notes. Rev. St. U. S. § 5136. To him is properly confided the custody of its property, money, securities, and valuable paper, and the supervision of its books and accounts. He is the executive officer, who transacts its daily affairs. The directors cannot divest themselves of the duty of general supervision and control by committing this duty to him, but they properly may intrust to him all the discretionary powers which usually appertain to the immediate management of its business."

To the same effect are:—

Baldwin v. *Bank of Newbury,* 1 Wall. 234, 240.

Fleckner v. *Bank of the United States,* 8 Wheat. 338, 360–361.

Security Savings Bank v. *Smith,* 144 Iowa, 203, 207.

Arnold v. *National Bank of Waupaca,* 126 Wis. 362, 366.

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It is, of course, possible for the president of a bank to be made by the directors its executive head and this is often the case with large banks in which the president devotes his whole time to the affairs of the bank and receives a salary proportionate to the responsibilities thus assumed. But such a situation is to be sharply distinguished from the ordinary case of a small bank, whose president receives only a nominal compensation, if any, and is engaged primarily in other business.

> "In some cases a president receives only a nominal salary, is expected to devote only a portion of his time to the business, and is not required to exercise the same degree of care and foresight as a president who is the real head and manager, and who possesses all the authority of the cashier."
>
> 5 Cyc. 468 (now 7 C. J. 547), quoted with approval in *Ex parte Rickey,* 31 Nev. 82, 100.

First State Bank v. *Morton,* 146 Ky. 287, 294, and *Dunn* v. *Kyle,* 14 Bush, 134, 142, are to the same effect.

So, in the case of *Prefontaine* v. *Grenier,* [1907] A. C. 101, it was held that the fact that the defendant was president of the bank and as such received a salary of $2,000 per year did not impose upon him a greater responsibility than that laid upon the directors generally. Sir Arthur Wilson said (at p. 110) :—

> "The fact that the defendant was remunerated for his services as president does not seem to their Lordships to strengthen the case against him. Indeed, the modest scale of his remuneration is scarcely consistent with the idea that he, a man of considerable position, and with a business of his own, was ever expected to give his time and labor to the detailed control of the work of the bank. It is much more consistent with the idea that he was expected to do what he did, that is to say, to devote some two hours

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a day to the business of the bank, two hours largely taken up by official interviews."

(3)

All of the foregoing authorities proceed, of course, upon the principle which is common to all cases in which alleged negligence is relied on as the basis of liability,—*i.e.*, that the act or omission in question must have been the proximate cause of the damage complained of or, in other words, that such damage might have been foreseen at the time of such act or omission as a natural and probable consequence.

Atchison, Topeka & Santa Fe Railway Co. v. *Calhoun,* 213 U. S. 1.

Milwaukee & St. Paul Railway Co. v. *Kellogg,* 94 U. S. 469.

Chicago, Burlington & Quincy Railroad Co. v. *Gelvin,* 238 Fed. Rep. 14 (C. C. A. 8th Circ.).

It will hardly be contended by the plaintiff that this principle does not apply to the alleged negligent acts of directors and others in like positions. Liability in such cases cannot be established simply by showing a failure to perform some duty; it is necessary to go further and to show that the loss in question might readily have been foreseen as likely to result therefrom. As was said in *Briggs* v. *Spaulding,* 141 U. S. 132 (at p. 151 in a passage already quoted), "It must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part."

So, in *Wallach* v. *Billings,* 277 Ill. 218, a bill to charge a national bank director for failing to give attention to

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the affairs of the bank was held bad on demurrer because (as the court said at p. 234) the bill "fails to show that he, under the circumstances, could have foreseen the results of his alleged inattention."

A fortiori, if it is probable that the losses would have occurred just the same even if the directors had done everything that the plaintiff maintains ought to have been done, there is, as the court said in *Warner* v. *Penoyer,* 91 Fed. Rep. 587 (at p. 591), "no justice in shifting them upon the directors, and no principle of law to justify it."

The result of the authorities, as applied to the case at bar, may therefore be summed up as follows:—

1. The directors, having acted with due care in employing Earl as cashier, had the right to delegate to him the keeping of the books and accounts and the supervision of the subordinate employees and were under no obligation to examine Coleman's ledger or to take any measures to ascertain whether he was doing his work with fidelity, unless there were brought home to them specific facts which would make it "gross inattention" to their duties not to investigate.

2. The measure of Edwin Dresser's responsibility was substantially the same as that of the other directors, in the absence of evidence that a larger responsibility than that inherent in the office of president had been expressly or impliedly imposed upon him.

3. Whatever the measure of responsibility, neither Edwin Dresser, nor any other director can be held liable for any damage not the proximate result of the acts or omissions complained of.

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D. THE CIRCUIT COURT OF APPEALS PROPERLY EXONERATED THE DIRECTORS FROM LIABILITY FOR FAILURE TO EXAMINE THE DEPOSITORS' LEDGER OR DETECT THE CAUSE OF THE APPARENT SHRINKAGE IN DEPOSITS.

The District Court held that the directors were all liable for the defalcations after September 30, 1907, Judge Bingham stating his conclusion thus:—

> "I find that the defendants were negligent in not making examination of the bank twice a year and in not ascertaining, when such examinations were made, whether the liabilities of the bank, as they appeared on the depositors' ledger, corresponded with the balance due depositors on the cashier's ledger, and that had they made such an examination Sept. 30, 1907, and only added the balance footings for the purpose of making a comparison they would have ascertained Coleman's irregularities, and not having done so they are responsible for his defalcations after that date" (pp. 208–209).

Judge Bingham also held that all the directors were liable, on an additional ground, for the defalcations after the end of September, 1909, saying:—

> "I find, also, that if in September, 1909, they had exercised reasonable care when they knew that the shrinkage in the deposits of the bank were abnormal and had called for and examined the checks that were in the bank, they would have discovered that large checks appearing on the slips of the National Union Bank were missing and would have learned of Coleman's irregularities, and are responsible for his defalcations after a reasonable time had elapsed for making such inquiry, and that a reasonable time for this purpose had elapsed at the end of September, 1909" (p. 209).

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The District Court thus placed upon the directors the burden of comparing the cashier's ledger with the depositors' ledger, and of adding the balance footings, notwithstanding that they were not familiar with book-keeping and had no reason to suspect that the cashier's supervision was not sufficient or his system of checking effective. More than this, the court imposed liability upon the directors for not having made the examination *on a particular day,* namely, September 30, 1907, when obviously there is no justification whatever for holding that an examination should have been made on that day rather than on any other; and when it cannot even be determined whether the figures now on the ledger for that day were there at that time (see p. 11, *supra*). The receiver admits (Brief, p. 194) that there was "no reason whatever" for the directors to have examined the books "on definite dates."

The District Court also imposed upon the directors the duty, when the deposits fell off, of personally examining the checks that were in the bank and of comparing them with the clearing house slips, although no one could have been expected to anticipate that this particular comparison would reveal anything, and although, while only the checks of the current month would be in the bank, the task of picking out from a considerable quantity of them those that had passed through the clearing house and comparing them with the small clearing house slips of the various banks so as to identify each check with an entry on the slip would have involved time-consuming clerical work of a kind which directors never do and are not expected to do.

These conclusions were manifestly in conflict with the authorities cited above, and it was only by charging the directors with duties with respect to matters of

detail far broader than those imposed upon them by law that Judge Bingham found grounds for holding them liable.

The Circuit Court of Appeals unanimously reversed the District Court's conclusion on both these points, on the ground that having no reason to suspect irregularities they were entitled to rely on the cashier's supervision of details and on the periodical examination by the bank examiners, and that neither law nor custom requires bank directors to make any such investigation of details as the District Court held they should have made.

(*a*) With respect to the first point, the directors were plainly under no obligation to make personal examinations of the depositors' ledger and comparisons between it and the cashier's book. Details of that sort were properly left to the accounting department of the bank. The cashier necessarily determined what books of account should be kept in the bank and by whom they should be kept, the methods of checking up the depositors' passbooks, of comparing the depositors' ledger and the cashier's ledger, of dealing with the statements from the clearing house or from other banks of claims upon the City Bank, and of apportioning their various duties among the different employees of the bank, and incidentally he determined by whom letters should be opened and what statements of their contents should be made to him. If in this respect the cashier, even through negligence on his part, adopted or permitted any wrong methods in reference to any of these matters in consequence of which losses were sustained, no liability attaches to the directors therefor, in the absence of any ground for believing the cashier to be negligent or incompetent.

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There is no evidence that they had any such ground for distrusting the work of the cashier.

It cannot be contended that the directors were negligent in not having a general audit of the books of the bank. There was no evidence that it was customary in national banks, at least at the time of the occurrences here in question, to have audits of the books by outside accountants, or that it was not the regular practice to rely upon the supervision and checking of the cashier and the semi-annual examinations of the bank examiners.

If Coleman had not been permitted to open the envelopes containing the checks from the clearing house, and if he had not been permitted to turn over to the cashier only the slips showing the amounts of the several checks and the totals, but not the checks themselves, and if his work had been supervised and checked more rigidly by Earl, the losses would not have occurred; but these were all matters which the directors had the right to leave to Earl, and in the absence of notice that he was not properly attending to these details they had a right to rely on him for the effective discharge of his duties.

The claim of the receiver (Brief, pp. 61–66) that there was negligence on the part of the directors in not making periodical examinations of the depositors' ledger, as he claims was required by section 19 of the by-laws (see p. 19, *supra*), was properly disposed of by the Circuit Court of Appeals. Even the District Court treated the by-law as nothing more than an admission on the part of the directors as to what they felt they were called upon to do (p. 195). The Circuit Court of Appeals, however, calls attention to the fact that the by-law does not expressly require the verification of the figures on the depositors' ledger, but leaves the choice of methods to the examiners.

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> "Taking it and the directors' practice under it together, we cannot regard them as clear and unmistakable evidence that the directors had considered themselves called upon to follow the process thought necessary by the court in making their examinations" (p. 1654).

The Court of Appeals also calls attention to the fact that the by-laws were adopted by the directors upon the organization of the bank in 1865 and not by the corporation, so that their requirements were not imposed upon the directors by any higher authority.

> "We see no reason to doubt that the requirements of Art. 19 might have been waived or their observance omitted by the directors, if regarded by them as no longer necessary, in the absence of special circumstance showing such waiver or omission to have been inconsistent with good judgment and reasonable prudence" (p. 1653).

The view of the Circuit Court of Appeals that, even if the by-law were to be construed as the receiver construes it, its non-observance would not necessarily show negligence, is supported by the decision in *Briggs* v. *Spaulding*, 141 U. S. 132, where there had been non-observance of a similar by-law for fourteen years.

Even if there had been semi-annual examinations of the depositors' ledger by the directors, there is no likelihood that Coleman's stealings would have been discovered. It is the receiver's contention that these examinations were supposed to take place in March and September of each year, just prior to the declaration of dividends (Receiver's brief, p. 185). *It cannot be supposed that Coleman would not have been fully as successful in preparing for such examinations by the directors, who had no knowledge of book-keeping, as he was in preparing for the semi-annual examinations by the bank examiners.*

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A few quotations from the opinion of the Circuit Court of Appeals will show the grounds upon which the judges unanimously exonerated the directors from liability for not examining the depositors' ledger and comparing it with the cashier's figures, and will make it manifest that the conclusion of the court was correct:—

"If negligence, as above appears, is not chargeable to the directors in respect of any of Coleman's stealings before September 30, 1907, it follows that they cannot be held responsible merely because of the deficiencies permitted by Earl to exist in the methods of routine followed in conducting the bank's regular operations or in recording them on its books, notwithstanding that it was by taking advantage of such deficiencies that Coleman was enabled to accomplish and conceal his stealings. They were entitled to rely, as they did, upon Earl to guard against any such deficiencies, and until some special necessity for such action was brought to their attention, they were under no duty to inquire or interfere independently of him" (p. 1651).

"To hold all the directors chargeable with negligence rendering them all so responsible, merely because they failed to make the additions and comparisons held necessary by the court, requires in our opinion, the application of a standard of diligence more exacting than any heretofore applied in the case of national bank directors. Nor can we regard the application of such rule as justified by the circumstances here shown" (p. 1653).

"We do not think it can be said that there would necessarily have been a negligent breach of duty on the part of every director had examinations in accordance with Art. 19 of the by-laws been wholly omitted during the period here involved, no special reason tending to forbid such omission being shown" (p. 1653).

"Nor can we find negligence on the directors' part clearly and unmistakably shown merely by the fact that they omitted to make the examination in the particular way

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which the District Court regarded as a necessary test required by ordinary considerations of precaution. . . . We cannot hold the above failure on their part to go behind the figures given them by the cashier on his ledger of itself to be a proved negligent failure in due performance of their duties. Such action on their part would have been a 'measure of unusual precaution, not imperative when there was no reason to distrust the integrity or efficiency of the cashier'; and directors, as has been held, are 'not to be deemed remiss because they did not resort to exceptional methods, or because they relied on the cashier's supervision over the books and accounts, or because they reposed confidence in his reports of the amount and other clerical details of the assets and liabilities.' *Warner* v. *Penoyer*, 91 F. R. 587, 591" (pp. 1654–1655).

"If any examination of the bank by the National examiners has since been made to appear in any respect inadequate, in the light of the discoveries made as above by the expert accountant, each of them appears to have been made at any rate much more thorough-going than any of the directors could have been expected to make without expert assistance. That such examinations were regularly made twice in each year, and without discovering anything wrong in the bank's condition or book-keeping, the directors knew, and that fact affords still another reason for believing that they were going along under a feeling of security, and with no cause to suspect wrong-doing or irregularities; a reason which tends to forbid the conclusion that the directors are shown to have clearly and unmistakably failed in the ordinary care due from them, merely by their omission as above to make more regular and more searching examinations themselves.

Nothing in the evidence tends to show that examinations of the kind held necessary by the court are or have ever been usually recognized or understood as part of the regular duties which directors of such a bank as this are expected to perform, nor is any such duty required by any rule of law. Judging these directors as they are entitled

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to be judged in the light of all the circumstances present to their minds at the time, as business men of average business abilities and accomplishments, with no pretentions to instinctive foresight, or expert training in respect to bank bookkeeping, we are unable to believe that their omission to make such examinations on September 30, 1907, or thereafter, in the absence of notice of special necessity therefor, clearly proves negligence on their part. To this extent we think the master's findings should have been confirmed" (pp. 1656–1657).

(*b*) With respect to the shrinkage in deposits, the Circuit Court of Appeals was likewise manifestly right in reversing the District Court and holding that the evidence fell "far short" of showing negligence in this respect (p. 1664).

At the outset the Circuit Court of Appeals held that the shrinkage in deposits did not become "abnormal" until at least a month later than the date adopted by the District Court, that is, until the last ten days of October, 1909, at the earliest (p. 1662). This finding was clearly right. Average deposits for several years, as all agreed, had been about $300,000, rising above or falling below that figure by about $25,000 (p. 1662). Not until about October 25 did the deposits reach an abnormally low point (pp. 1118–1120, 1124).

The following statement gives a comparison of the total resources and deposits as appearing upon the cashier's ledger as of September 1, 1908, and September 1, 1909:—

	Resources	*Deposits*
September 1, 1908.....	$496,430.76	$319,569.22
September 1, 1909.....	469,856.30	297,807.57
Shrinkage	$26,574.46	$21,761.65

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With reference to this comparison the master says:—

> "Notwithstanding that $94,224 had been taken in that interval, the shrinkage, as it appeared upon Earl's book, the general ledger, came within the range of perfectly normal variations and the deposits were not abnormally low" (p. 57).

In 1905 and 1906, before Coleman's stealings began, the deposits were often much below $300,000. Thus the weekly statements prepared by the cashier and submitted to the directors at their meetings showed the following aggregate of deposits, omitting the cents, on certain days in 1905 (p. 1409):—

July 29	$265,202
August 12	278,739
August 19	270,351
August 26	246,482
December 2	264,034

Statements as of the foregoing dates are the only ones for the year 1905 which were contained in Exhibit 56.

In 1906 the deposits ran below $300,000 in six different months and below $287,000 in four of the months (p. 1363).

In 1907 the apparent deposits, meaning by that the amounts as shown on the cashier's ledger, appear not to have gone below $294,997, that being the amount on November 29th (p. 1105). In 1908 the apparent deposits were several times below $300,000, the low point being reached on June 29th, when they stood at $276,540 (pp. 1106–1116).

In 1909 the apparent deposits did not go below $300,000 until April 13th, when they were $298,714. They then quickly rose to $343,676 on May 4th and did not go below $300,000 again until May 25th (p. 1117). They at once increased and remained about $300,000 until June 24th,

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when they fell to $289,737 and they continued to drop until June 29th, when they reached $271,535. They then rose rapidly through July, increasing to about $340,000 toward the end of the month, and not falling below $300,000 again until August 30th. The deposits shown on the books *never* reached the figure of $417,500 given in the receiver's brief (p. 41). In the middle of September they stood at $311,439 and were above $300,000 on September 21st. On September 28th they had fallen to $271,349, but by October 4th they had increased by over $12,000 and throughout the first three weeks of October they continued to average about $280,000, which was low but not abnormally so (pp. 1117–1120, 1124).

On October 25th the apparent deposits had fallen to $255,878 and from that time they seem to have fallen almost without a break (pp. 1124–1125) until the time of the bank examination on December 3d, when the individual deposits according to the examiner's report amounted to only $152,806 (p. 1443).

The statement submitted by the cashier at the directors' meeting on October 23d showed deposits as $261,877 (p. 1430). This is the first time that the weekly statements showed deposits below $275,000, which was the figure accepted by the Circuit Court of Appeals as a "low normal," according to the averages of the last few years (p. 1662). While the deposits shown in the statement of October 23d were lower than for some time, one of the weekly statements in August, 1905, before the stealings began, had been lower (p. 1409).

While the deposits fell steadily during November, 1909, they rose in the first part of December. They then fell to $135,662 on December 28th, after which they increased with considerable rapidity until on January 18th they amounted to $181,947.33. Thereafter they fell rapidly until the close of the bank (pp. 1125–1126).

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In considering the abnormal decline in deposits in the latter part of 1909, it must be borne in mind that the directors had been accustomed to marked fluctuations in the amount of the deposits. For example, in less than six months after August 26, 1905, the deposits had increased from $246,482 (p. 1409) to $335,200 (p. 1363), an increase of almost 40 per cent. On the other hand, they fell from $350,701 on April 23, 1906, to $286,743 on May 31st, a drop of almost 20 per cent., and within the ten days between May 21 and May 31, 1906, they dropped from $347,443 to $286,743. On the other hand, between August 30, 1906, and February 14, 1907, there was an increase from $286,725 to $374,844, an increase of over 30 per cent. (pp. 1363, 1094).

It is apparent from the foregoing figures that the deposits in the bank were subject to wide variations from perfectly normal causes and that a very considerable increase or decrease would naturally not attract particular attention.

When, however, the amount of the decrease in the fall of 1909 did become abnormal, the directors of course observed it and took various steps to ascertain its cause. The conclusion at which they arrived was that bank deposits generally were falling off and that their competitors in Cambridge were getting their business.

The evidence as to the inquiries and investigations which they made and facts which they learned, briefly summarized, was as follows:—

(1) They made inquiries of the cashier and were told that depositors were drawing out their money or not making new deposits, and that the trust companies were getting the business.

Sumner Dresser	pp. 1298–1300, 1302
Gale	1248, 1265
Edwin Dresser	1170, 1183

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(2) They were similarly told by the teller that people were not depositing their money or were drawing it out.

Sumner Dresser pp. 1299, 1302, 1316
Edwin Dresser 1170, 1183

(3) They were told that several large accounts, which were named, were being greatly reduced, and that large sums, amounting to $40,000, had been withdrawn to pay taxes.

Earl pp. 336–337
Sumner Dresser 1302
Gale 1248, 1265
Edwin Dresser 1183

(4) They inquired of Coleman, who gave plausible reasons for the decline.

Coleman pp. 831–833

(5) They saw that clearings were large, which would account for a decrease in deposits.

Sumner Dresser pp. 1299

(6) They saw statistics showing that deposits throughout the country were falling at a very rapid rate, some of the largest New York banks having lost 30 per cent. in four months.

Barber pp. 1272
Sumner Dresser 1303–1304

(7) They saw that the trust companies in their vicinity were increasing in deposits.

Sumner Dresser pp. 1305
Gale 1265

(8) They knew that their competitors' locations were nearer the business centres of Cambridge than theirs;

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that they had large boards of influential directors; that they were paying as high as 4 per cent. on thirty-day deposits, and were advertising and had tried to get business from the City Bank.

Sumner Dresser	pp. 1299–1302, 1349–1350
Earl	330

(9) They asked the cashier in November, 1909, to go over the books and count the securities to see whether any mistake had been made, and the cashier reported at the next meeting that no error had been found.

Sumner Dresser	pp. 1306

(10) Pepper, the bank examiner, told the president that the bank was all right in December, 1909, and the president so reported to the directors.

Edwin Dresser	pp. 1170
Gale	1249
Barber	1276
Sumner Dresser	1310

The conclusion of the directors that the drop in deposits was due to normal causes was correct in part at least, as it appears that during the month of November, 1909, there would have been an actual decrease in deposits of $23,680 even if there had been no stealings (p. 52).

The master found that

> "in September or the early fall of 1909 the directors considered the question of the apparent shrinkage in the deposits in an effort to find a cause for it; that they took the figures from various public sources as to conditions in New York which showed very large decreases in deposits in the banks there. They also examined the published reports of rival institutions in Cambridge, which they construed

as indicating a large increase of deposits in those banks at a time when general deposits seemed to be falling; that they came to the opinion that general conditions of business and the competition of newer and younger institutions, making more attractive offers to depositors, were the cause" (p. 57).

The master also referred to the testimony of Edwin Dresser concerning the added inducements in the way of interest which were offered by the trust companies in the vicinity and the efforts they were making to get deposits. The master concludes:—

"I find as a fact that the directors did consider these questions and that they did come to a conclusion as to the reasons for the falling off in their own deposits.

I do not find, as a matter of fact, that the things that they considered were the real reason or that they were right in their conclusions, or fully and correctly informed as to some of the things that they considered as facts, but confine myself to the finding that they did make such effort to find explanation for the condition in their own bank which they realized existed.

The possibility of error in the cashier's book was considered and it was gone over and the cash and securities counted and examined and found to correspond with his reports.

The possibility of embezzlement or defalcation did not occur to them, was not considered, and no audit of the bank was made as a part of their investigation and examination into the condition of the bank" (pp. 58–59).

In the opinion of the District Court the subject is thus dealt with:—

"No evidence has been called to my attention, and I have been unable to find any in the case, showing that the directors made any other effort than that found by the master to ascertain the cause of this sudden shrinkage in the bank's deposits" (p. 201).

> "It seems inconceivable that men, who were aware that funds entrusted to their care were diminishing at an unprecedented rate, could be said to be exercising reasonable care in the performance of their duties by simply looking at the state of the New York banks, as reported in the 'Boston Herald,' or the reports of the other banks in Cambridge showing the state of their deposits and not looking at the checks in their own bank to see who was drawing out the money and the amounts, or making any examination of the depositors' ledger."

This last statement is manifestly inaccurate and unfair. It is not true that "funds entrusted to their care were diminishing," a statement which naturally indicates that the assets of the bank were disappearing. What was happening was, of course, that funds were apparently not being intrusted to their care to the same extent as formerly, a fact which has no tendency whatever to indicate that the bank is being robbed. Furthermore, Judge Bingham omits any reference to several of the steps which the directors took, as above set forth, and he was manifestly wrong in ruling that they should have themselves investigated the depositors' ledger and the checks in the bank and ceased to place reliance upon the cashier and his books.

In holding that the District Court was wrong and that the evidence fell *far short* of showing negligence with respect to the matter of the falling off of the deposits, the Circuit Court of Appeals said:—

> "The evidence by no means shows that inquiry as to withdrawals of deposits was wholly neglected, or that the directors' adoption of a mistaken explanation as accounting for the shrinkage was altogether without excuse. They were told by the cashier that the depositors were drawing out their money. He specified several large accounts from

which considerable withdrawals had recently been made. They were also told by the teller that while no account was being lost, the accounts were being largely reduced by the depositors themselves. That all this did not go far enough to account for all the shrinkage is true, yet we do not see how the directors, other than Edwin Dresser, could reasonably have been expected to find out of themselves that it was not true, and in view of the rule that the conclusion of negligence must be clearly and unmistakably established in order to reject the findings of the master, we cannot find warrant for sustaining the finding of the District Court that they were so far culpable as to make them chargeable with individual liability upon the ground of negligence in failing to do more than they did. . . . We think the omission to do more falls far short of affording the measure of proof required to justify clearly and unmistakably, and contrary to the findings of a master, a conclusion of negligence and individual liability on the part of directors for the wrong-doing of clerks or subordinate officers of banks to whom duties have been entrusted" (pp. 1663–1664).

"The only effectual step which these directors could have taken toward finding the true reasons for the shrinkage noticed in the fall of 1909, would have been to order another complete audit made by competent experts.

We cannot regard it as clearly shown, however, that their failure to take this course was a negligent failure in the reasonable care required of them. No such action was recommended or even suggested by the cashier or by the president; nor is any sufficient ground found for the conclusion that the directors ought then to have known that they could no longer safely rely upon the cashier, or his methods, or his representations regarding the bank's condition, but were called upon to take action independently of him" (p. 1664).

"On Dec. 3, 1909, the next examination of the bank by a National examiner was made. By that time the deposit totals had further declined to $151,506.30, a decline since

the June examination which must have attracted the examiner's notice. Yet neither in his report, nor to the directors, did he suggest that anything had been found by him requiring correction or investigation, of the bank's condition at that time.

Though they knew that his (the bank examiner's) examination was by no means a complete audit, the circumstances that he had found nothing wrong might justly tend to confirm the directors in their reliance upon the cashier" (p. 1665).

It is difficult to see upon what ground it can be contended that the directors should have suspected wrongdoing when neither the cashier nor bank examiner Pepper nor the two experienced bank men who were added to the board in January, 1910, had any such suspicion.

So far as Pepper's experience is concerned, he had been a bank examiner for nearly fourteen years and had made 1,000 to 1,200 examinations (pp. 1224–1225).

The National Bank Act (Rev. Stats. § 5240) as it read during the period in question provided as follows:—

"The comptroller of the currency, with the approval of the Secretary of the Treasury, shall as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every bank association, and who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof; and shall make a full and detailed report of the condition of the association to the comptroller."

The broad scope of the examination actually made by Pepper is indicated by his report of his examination of December 3, 1909 (Exhibit 144, p. 1443), and by his testimony as to what he did on the occasion of each visit to the bank (pp. 1227–1238). When he examined the bank

on December 3, 1909, his attention was attracted to the loss of apparent deposits in six months, amounting to almost $100,000, leaving the deposits only half of what had been the normal figure for several years past. With respect to the decline in the deposits, he testified that Earl told him it was caused by large withdrawals at the solicitation of the trust companies in the neighborhood, and that he accepted that explanation and saw no cause for suspecting that any one was stealing from the bank (p. 1241). He admitted that he may have told Mr. Dresser that he could "give him a clean bill of health," adding, "My report shows that." His report (p. 1444, foot) shows that he specifically found the depositors' ledger to be kept properly.

As the Circuit Court of Appeals said: "The circumstance that he [Pepper] had found nothing wrong, might justly tend to confirm the directors in their reliance upon the cashier" (p. 1665).

Furthermore, in January, 1910, two experienced bank men were added to the directorate of the City Bank, namely, Charles G. Bancroft and Josiah H. Goddard, (pp. 854, 1354), who knew all about the serious decline in deposits but did not suspect stealing.

Bancroft was at the time and had been for several years receiver of a national bank in Attleboro, had had long experience as counsel for and director of national banks, and was thoroughly familiar with the methods of keeping books in banks (pp. 860–861). He went on the board of directors of the City Bank at the request of one Jones, whose wife and her sister owned a considerable block of the stock of the bank, and he went on the board for the purpose among others of finding out what was the cause of the decrease in deposits. He talked with Edwin Dresser and Sumner Dresser and was aware

of their belief as to the reason for the decrease. He bought his stock on the strength of a statement of the condition of the bank, and made no examination of the books except the assets ledger, which he had looked at to see if there were any "bad pieces of paper." His testimony shows that *it did not occur to him that there was anything wrong at the bank or that there was anything irregular about the conduct of its affairs* or that it was advisable to compare the checks in the bank with the clearing house slips or examine the deposit ledger, *nor did it occur to him that an audit should be made* until about a week before the failure (pp. 858–861).

Goddard was at the time president of the South End National Bank of Boston (p. 1352). He bought the same amount of stock as did Mr. Bancroft and they became directors at the same time (p. 1354). He, like the other directors, regarded the drop in the apparent deposits toward the end as being something very serious and he was familiar with the explanations suggested by the other directors. He testified that the idea that any money had been stolen did not, so far as he knew, come into anybody's mind until the actual discovery of Coleman's criminality (pp. 1357–1358), which was just before the bank was closed (pp. 854–856).

The cause of the apparent decline in deposits is now perfectly clear, and it is easy to see how, if certain things had been done, Coleman's criminality would have been detected at an earlier date. When it comes, however, to a consideration of the impressions reasonably created on the minds of experienced bank men by the decline in the deposits and of the question whether or not under the circumstances reasonably careful directors would have been minded to do more than the defendants did, it is submitted that, wholly apart from other considera-

tions, the testimony of Pepper, Bancroft, and Goddard is conclusive in favor of the defendants, and that the decision of the Circuit Court of Appeals is clearly right.

E. No substantial Difference between the Position of Edwin Dresser and that of the other Directors is suggested by the Majority of the Circuit Court of Appeals except the Fillmore Incident

In holding Edwin Dresser liable while exonerating the other directors the majority of the Circuit Court of Appeals treated the Fillmore incident as decisive. The opinion shows that had it not been for the brief conversation between Dresser and Fillmore in October, 1908, Dresser, like the other directors, would have been freed from liability.

After holding that the statement made by Fillmore called for immediate action on Dresser's part (pp. 1657–1660), the court goes on to say that "*because* of his failure to take any steps himself regarding what Fillmore had told him, and because of his failure to inform the directors, thus affording them an opportunity of then putting a stop to Coleman's frauds, . . . the responsibility for losses due to their further continuance must rest upon him" (p. 1661).

Later the court refers to its "conclusion that Edwin Dresser's negligence in disregarding the Fillmore statements about Coleman had made him responsible for the failure to discover and stop the stealings ever since the end of November, 1908" (p. 1662).

It is obvious that the Fillmore incident was made the turning-point of the case by the majority of the Circuit Court of Appeals, and that it was that incident alone which led to the distinction which they drew between Ed-

win Dresser and his fellow-directors and to the imposition upon the former of liability to the extent of $264,000. This is admitted in the receiver's brief (p. 79).

F. The Fillmore Incident is not a valid Ground for differentiating Edwin Dresser's Case from that of the other Directors

1. *The Source of the Remarks about Coleman and the Circumstances which led up to them were such as to warrant Dresser in concluding that they called for no Action on his Part*

It is submitted that the master and Judge Brown are right and that the so-called Fillmore warning has, as Judge Brown says, "been given undue and artificial importance" (p. 1666).

The Fillmore incident is discussed in the master's report (pp. 86–88), by the District Court (pp. 204–205, 209), in the majority opinion of the Circuit Court of Appeals (pp. 1657–1661), and in the dissenting opinion (pp. 1666–1670). The testimony of Fillmore, upon which so much has been made to turn, is brief (pp. 294–298). The incidents described by him, which were dismissed by the master who saw and heard Fillmore as insufficient to charge Edwin Dresser with liability, and which the District Court treated as a basis of liability only in a secondary and unimportant way, have grown so in importance as the case has progressed that they have now been magnified into the decisive factor.

It is important to consider not only what Fillmore said to Dresser, but also the circumstances which preceded it, in order that we may put ourselves as far as possible in

Dresser's position and estimate his conduct in discrediting what was said to him.

Fillmore testified that, some fifteen years before, he left a package in the bank containing about $150 in money, for safe keeping; that the package consisted of a pasteboard box tied with a string; that he saw the box once after Earl became cashier, but could not give the date; that in February, 1908, he called for the box, but it could not be found and never has been found; that Mr. Earl searched in vain for it in the vault, saying that some changes had been made in the vault, but that the box would be found; that after returning from California in April, 1908, he had several conversations with Earl about the box; that afterwards on three occasions he spoke to Edwin Dresser about it; that on one occasion Dresser asked him if he had a receipt for the box and wanted to know why he had not put it in the savings bank (pp. 294–298). Finally on September 29, 1908, the witness wrote a lengthy letter to Mr. Dresser as president of the bank in which, after describing the contents of the package and the efforts made by Earl to find it, he concludes:—

> "While the National City Bank may not be legally bound to make this loss good, at the same time I consider it under moral obligation to reimburse me for this loss. As I never had it in my hands but at the times above mentioned and never removed it from the bank, I can come to but one conclusion, that it has been destroyed or removed by someone connected with the bank. I hope you will bring this matter before the Board of Directors of your bank and inform me of the result at as early a date as convenient."

Fillmore further testified that he received no reply to this letter from Dresser, and subsequently, about a month later, met him on the street and had another talk

with him lasting "about three minutes perhaps . . . it might have been five minutes talk." The substance of the conversation was thus stated by the witness: "I told him that it was very evident there was a thief at the bank; that the money had been stolen. I said, 'I would advise you to look after Coleman, for I believe he is living a pretty fast pace, and I have pretty good authority for believing he is supporting a woman.' "

Earl testified that he never saw a box such as Fillmore described; that he had seen only one box belonging to Fillmore, which contained silverware; that he had hunted half a dozen times for the box in question and had had others help him, without success; that he thought possibly Fillmore had taken it away, and had conversations with him on the subject; that none of the clerks seemed to know anything about the box, and that it was always "sort of a mystery which he could never explain" (pp. 332–333).

Edwin Dresser testified that until Fillmore complained to him about the box he had never heard of it; that after his complaint he requested the cashier to look for it and to make other searches, but that it could not be found; and that he heard no suggestion or complaint that anybody had stolen the box (p. 1168).

There was no evidence that Coleman, who came into the bank's employment many years after Fillmore left the box, had taken it or had ever seen it, and Coleman, whose truthfulness as a witness cannot be questioned, especially by the receiver who relied on his assistance in the preparation of the case and on his frank testimony as to all the details of his thefts and his various methods of concealing them, testified that he did not take the box and knew nothing about it (pp. 531–532).

Yet the whole case is made to turn on the suspicion which Fillmore entertained that his box had been stolen

and his brief and casual remarks to Dresser accompanying his statement of his suspicion.

Edwin Dresser, in point of fact, took no stock in what Fillmore said. It was his honest judgment that there was nothing in it and no reason for repeating it to his fellow-directors. It appears clear, now, that if Coleman's books had then been audited, further thefts would have been prevented. But, as will be hereafter argued, it by no means appears that Fillmore's remarks, even if they had been reported by Dresser to the board, would have led to an audit. Furthermore, for a mere *error in judgment,* if it was an error, Dresser is not liable. In order to create liability it must be determined that the conclusion at which he arrived was much more than a mere error of judgment,—that it was an act of positive negligence.

If Edwin Dresser had been in the position of a bank director who rarely attended the meetings of the board or visited the bank, was completely out of touch with its affairs, and so far as he was concerned had turned over the entire control and supervision of the bank's business to the cashier, his duty with reference to the Fillmore conversation might well have been different, on the ground that he had not the data on which to form an intelligent judgment concerning it himself. In the situation which actually existed, however, through his close contact with and intimate knowledge of the cashier and his subordinates and his close supervision of that portion of the business which fell within the scope of his duties as president, Edwin Dresser was in a position to form an intelligent opinion as to the weight to be given to Fillmore's remarks. Though the opinion which he formed is now shown to have been erroneous, he never-

theless incurred no liability if the opinion was one which he might reasonably have formed.

> "One must be careful not to judge them [the directors] by the easy but fallacious standard of subsequent events . . . One must remember that in a strange and difficult situation different men are apt to come to conclusions wide as the poles asunder, and yet without any suspicion of dishonesty . . . Masterly inactivity may be prudence to one man, desperate rashness to another, and to show a bold front may approve itself to a competent judge . . . Fortunately it is not for the Court to decide, or even to consider, which, if either, was right . . . The tests of liability are whether the exercise of intelligence and discretion might reasonably have induced the actual conclusion, and whether intelligence and discretion were in truth, that is honestly, exercised." *In re Liverpool Household Stores Association,* 62 L. T. R. (N. S.) 873, 874.

Bank directors "are not required to adopt any system of espionage over their cashier or any of their subordinate agents, or to entertain suspicion without some apparent reason, and, until some circumstances transpire to awaken a just apprehension of their want of integrity, have a right to assume that they are honest and faithful." *Warner* v. *Penoyer,* 91 Fed. Rep. at p. 590.

Can any one who gives the matter careful thought, and undertakes to put himself back in the position in which Edwin Dresser then stood, with his years of acquaintance with Coleman and observation of his characteristics, feel any assurance that he would have turned away from Fillmore, after the sidewalk conversation, with a "just apprehension" of Coleman's want of integrity?

It must be remembered that at the time of the conversation Dresser had had more than five years' experience with Coleman without ever finding anything in his con-

duct to criticise, but observing him at all times to be regular in his attendance at the bank, apparently capable and efficient, and in all respects above criticism; that he had formerly been intrusted many times with large sums in cash which he had carried safely to Boston; that when as teller he had full access to the cash in the bank, no suspicion had attached to him, and that at the time of the conversation he was a mere book-keeper without access to the cash or securities of the bank and with no apparent opportunity for stealing. It must further be remembered that Dresser had reason to believe that Earl's supervision of *all* his subordinates was thorough and careful. The bank was in a flourishing condition. The deposits were running from about $320,000 to about $340,000 (p. 1115) and were considerably in excess of those of the same month of the previous year and still more in excess of the average for the preceding three or four years (pp. 1103, 1273, 1274). There was nothing to lead to a suspicion of criminality on the part of any one in the bank.

It is very important, too, that *no mention of Coleman had been made in any of the preceding conversations with Fillmore, nor in the lengthy letter formally presenting the claim;* that the first mention of him came in a casual conversation on the street and from the lips of one aggrieved over the loss of the box; that Dresser must have doubted whether the box had ever been in the bank and naturally gave no weight to the suggestion that Coleman had taken it. The other remarks accompanying a charge which seemed so unfounded were presumably dismissed as coming from a disgruntled person, and as being entitled to no more weight than the charge itself. The entire conversation must have impressed Dresser as being merely part of an attempt to get the bank to assume responsibility for the $150.

It is apparent that there was nothing in the circumstances to indicate that Fillmore acted and spoke with the deliberation naturally to be expected of one making a serious charge. The occasion was only a casual meeting on the street, and *the charge, if it was one, had never been made before and was never repeated.* In view of the length of time that had elapsed since Fillmore had left the package in the bank, the various changes in personnel that had occurred in the mean time, and especially in view of the cashier's report about the box to Dresser, Fillmore's suggestion that there was a thief in the bank who had stolen the package must have seemed to Dresser entirely unwarranted and the language employed wholly unjustified.

That Fillmore himself had no suspicion that anything serious was happening in the bank is apparent from the fact that he did not withdraw his deposit, but kept it until the bank closed its doors (p. 294).

With respect to Fillmore's belief, expressly based on hearsay, that Coleman was supporting a woman, it is significant to note that at about the time of the conversation in question one Lombard made a similar statement to Earl and that Earl reported what Lombard had said to Dresser, at the same time giving the most satisfactory of all explanations by informing Dresser that the woman referred to was probably a Miss Taylor, to whom it was reported that Coleman was engaged; and that later, after Earl had taken the matter up with Coleman, he reported to Dresser that Coleman told him it was she and that he had a right to go with her (pp. 330–331).

The Fillmore conversation took place about a month after September 29, 1908, and Earl testified that his talk with Lombard was about three years before the date of

his testimony, which was January 3, 1912 (p. 331). It is thus apparent that the Lombard incident and the Fillmore incident were near together in point of time, it being impossible to tell from the evidence which came first. In any event, either just before or just after his talk with Fillmore, Dresser received from the officer in charge of the bank's employees a satisfactory and, so far as appears from the evidence, a *true* explanation of the story about the woman.

Coleman had to a most unusual degree the ability of inspiring confidence in his associates and his superiors, as is shown among other things by the fact that none of his daily associates in the bank for a moment suspected his dishonesty. The good reputation he enjoyed and the confidence he inspired were not confined to his immediate associates, for it appears that he was made treasurer of the Kissel Kar Company in 1909 and that in 1907 or 1908 he was engaged by the cashier of the neighboring Harvard Trust Company to render services in connection with the opening of its books (p. 837).

To any one who knew Coleman as Dresser did, remarks such as Fillmore's would carry no weight at all, with the possible exception of the report that Coleman was supporting a woman. Here came a coincidence in the shape of a similar report from another depositor. The cashier's investigation of Lombard's story as reported to Dresser served not only to show that Lombard had wronged Coleman, but at the same time to make it appear that Fillmore had merely repeated what was shown to be a slander. Whether the remark about the woman was true or not, as the evidence does not disclose, it was a circumstance peculiarly well calculated to silence gossip and make an investigation seem unnecessary, that at that very time Coleman was reported to be engaged to

a girl of respectable and ladylike appearance who had favorably impressed the cashier of the bank (p. 331). Lombard, like Fillmore, never spoke again about the matter.

The question as to Edwin Dresser's negligence with respect to the Fillmore conversation must depend in large part on the amount of confidence which he reasonably reposed in the cashier and in Coleman, and on the impression which ought reasonably to have been made upon him by what Fillmore said. The master saw and heard the cashier and Coleman and Fillmore and in that way gained information of the most important character which could not be communicated to the courts. His findings should not be disturbed.

It is submitted that Judge Brown, in his dissenting opinion in the Circuit Court of Appeals, took the correct view:—

> "I am especially of the opinion that what may be termed the 'Fillmore warning' has been given undue and artificial importance as a notice putting Edwin Dresser on guard against Coleman as an untrustworthy person, whose conduct should have been brought to the attention of the other directors and made the subject of investigation. . . .
>
> There appears no sufficient ground for Dresser's accepting Fillmore's conclusion that the box had in fact been stolen, and that for this reason there was, at the time of this conversation, 'a thief in the bank' or that Coleman was a just object of suspicion on that account. . . .
>
> In this formal communication a letter of September 29, 1908 Fillmore makes no charge of theft and no allusion as to Coleman and suggests no suspicion of him. The matter which he desires to be brought before the board of directors and to be informed of the result is a request for reimbursement of $150. . . .
>
> After the lapse of about a month without a response to

his request, and upon a casual meeting on the street, in a very brief conversation he first suggests his suspicions of Coleman. At no time, either by his letter or orally, did he suggest bringing before the Board the question of an inquiry into Coleman's conduct.

That Fillmore's suspicions were of serious weight even with himself seems doubtful from the fact that he did not withdraw his deposit, but, like Dresser, remained a depositor in the bank until it closed. . . .

Should Fillmore's statement not of facts, but of suspicions, have led to an investigation of Coleman's life outside of the bank?

It should not be left out of account that Coleman was daily at the bank, where he was under observation of Dresser, and especially of Earl, the cashier. He was well behaved, industrious and courteous, and was well liked. There was no evidence that he was criticised by any one in the bank because of anything in his conduct or bearing. He was known to be the son of a reputable father, who was in business in Cambridge, and a man of some financial standing.

How far Dresser's own knowledge of Coleman, and his judgment from personal observation of Coleman, justified him in attaching no weight to Fillmore's suspicions is especially a question of fact upon which the master, who had Coleman under close observation as a witness, as he did also the other witnesses who testified as to Coleman's conduct, was much better qualified than judges who have only a printed record. That Dresser had complete confidence in Coleman is manifest. That this confidence was not in fact disturbed by Fillmore's statement is manifest. Should it have been? Our own knowledge of men constantly leads us to discredit and instantly reject rumors and suspicions concerning them. There is no rule of law that determines when it is reasonable and when it is unreasonable to do so. The master has found in favor of Edwin Dresser upon this point.

The practical rules which determine the weight to be

attached to a master's report are especially applicable on just such a question as this, and for sound reasons weigh heavily in favor of this defendant.

. . . . . .

If Dresser erred in considering all that Fillmore said as a mere incident to his claim for reimbursement for the loss of the package, and should have made inquiry into the statement as to Coleman's supporting a woman, the inquiry would probably have led then, as it did later, to the explanation that the woman was engaged to Coleman; that she had occasionally called at the bank, and that she was a 'ladylike and well-appearing young woman'" (pp. 1666–69).

2. *The Fillmore Incident was in no Event calculated to suggest to Edwin Dresser the Need of an Audit of Coleman's Books*

Even if it be thought that Edwin Dresser should have taken some action after the Fillmore conversation, it cannot be reasonably claimed that the action taken should have included an examination of Coleman's ledger.

Fillmore's intimation that Coleman had stolen the box carried with it no suggestion that his *book-keeping* was not being properly done.

If Dresser *had* reported the matter to his fellow-directors, what would have been the result? The directors would presumably have discounted what was said just as Dresser did, and at the most would have talked with the cashier about it. If they had gone to the extent of cross-examining Coleman, however thoroughly, it would have appeared at the end that Coleman had not taken the box and indeed that it was doubtful whether the bank had ever had it in its possession during the time of his employment. Coleman might have been cross-examined

about the woman and unquestionably would have told the board just what he told the cashier after the Bullard incident. The cashier would have informed the directors of the excellent appearance of Miss Taylor, and it is inconceivable that the board would not have been entirely satisfied.

As to Coleman's alleged fast life, it is probable that the directors would have felt that any suggestion made by Fillmore on that point was based on the remark he had heard about the woman, and had no further foundation. The members of the board would with reason have felt that if he had been living such a life some evidence or intimation concerning it would have come to them, either from his appearance or manner of doing his work or from the cashier or one of the other employees or from depositors or friends. Indeed, if there had been anything notorious about Coleman's manner of life it is inconceivable that it should not have been called to the directors' attention in some way during the three years.

Having in mind at all times the kind of man Coleman appeared to the directors and the cashier to be in October, 1908, after he had worked with them for nearly six years, the apparent prosperity of the bank, and the absence of any suggestion that there was anything wrong with the accounting system of the bank or that a dollar of its funds had been stolen, it is submitted with confidence that the board of directors, acting as reasonable men, would never for a moment have thought it necessary to direct an audit of the books.

As Judge Brown says:—

> "It [Fillmore's charge] had no relation to any business of the bank, or to any matters of accounts or of book-keeping, or to the disappearance of any funds of the bank" (p. 1666).
>
> "To take the statement 'there is a thief in the bank'

away from its connection with the unexplained disappearance of Fillmore's package of $150 at some indefinite date, a matter having no connection with the business and books of the bank, and to convert it into a warning connected with a great loss of $300,000, more or less, through an unprecedented manipulation of the credits and books of the bank, seems unjustifiable. An inquiry into this matter, which had already been inquired into, would not naturally have led to an investigation of Coleman's book-keeping" (p. 1668).

Even if Dresser were negligent in not reporting the Fillmore incident to the directors, he is nevertheless not liable if the loss "would have occurred just the same notwithstanding [he] had been ordinarily diligent and vigilant" (*Warner* v. *Penoyer,* 91 Fed. Rep. at p. 591), nor unless the losses were the "natural and necessary consequence of omission on [his] part" (*Briggs* v. *Spaulding,* 141 U. S. at p. 151).

It cannot be said that it was a "natural and necessary consequence" of the failure of Dresser to report the Fillmore conversation to the directors, that $265,000 should thereafter be stolen from the bank, and similarly the strong probability is that the thefts would have occurred just the same, even if Dresser had reported the conversation and the directors had been ordinarily diligent and vigilant in dealing with the matter.

One is bold indeed who would assert today that, placed in Dresser's position in October, 1908, and knowing what Dresser knew of Coleman, he would have been led by the Fillmore conversation to a detection of Coleman's criminality.

In the majority opinion of the Circuit Court of Appeals it is said that "Notice sufficient to attract attention, and put a party on his guard and call for inquiry is notice of

everything to which such inquiry might have led" (p. 1659), and the Fillmore incident is dealt with in the light of this principle. The quoted words may well be applicable to cases such as the court cites, but they seem to have no application to the facts in the present case. The question here is whether under all the circumstances Edwin Dresser used the required degree of care. If, in spite of the considerations urged above, it should be held that he ought to have made an investigation after the conversation with Fillmore, it cannot be held that he must now be taken to have known everything to which, by any possibility, an investigation "*might* have led." On the contrary, the limit of his duty on any theory would have been to make such an investigation as would be reasonable under all the circumstances, and the question would be as to what such an investigation might fairly have been expected to lead to, not what it might by any possibility have disclosed. It is by no means established by the evidence in this case that any inquiry which the Fillmore conversation might be thought to have required would naturally have led to an inspection of Coleman's books or, even if it had led to such an inspection, would have disclosed the stealings. (See pp. 121–122, *infra.*)

3. *In treating the Fillmore Incident as decisive, the Circuit Court of Appeals was influenced by certain manifest Errors*

The Circuit Court of Appeals was induced to give decisive weight to the Fillmore incident by two classes of errors with reference to collateral or subsidiary matters. In the first place, the court made certain assumptions of fact which are entirely erroneous, being directly contrary to the master's findings and to evidence which can-

not be controverted. In the second place, again departing from the master's conclusions, the court gave to certain admitted facts, looking back upon them in the light of all that is *now* known, an importance and significance which they never had and could not be expected to have had in the mind of Edwin Dresser. The court also took into consideration matters not appearing in this record.

(a) *Coleman was not in a Position affording "greatly enlarged opportunities for Stealing"*

The court fixed the standard of care which it holds that Dresser should have lived up to in the fall of 1908 on the basis of its assumption that Coleman was at that time "being trusted in positions affording greatly enlarged opportunities for stealing" (p. 1659). This is a fundamental misconception of the situation, and it may have been enough of itself to have led to the imposition of liability upon Dresser. In point of fact, Coleman's opportunities for stealing in the fall of 1908 were less than those of any other employee in the bank. This is indisputable and furnishes the reason why this case is absolutely without precedent in the history of banking. Instead of having "enlarged" opportunities for stealing in 1908, Coleman's opportunities were much less than they had previously been. When he was messenger he had carried large sums of money to Boston, alone, amounting, as the cashier testified, to perhaps $100,000 in all (p. 337). During the two years and more ending in November, 1907, when he had been doing the work of teller, he had had the handling of the cash in the bank. Thereafter, as the master finds, he had nothing to do with the handling of the cash or the securities (p. 53). Earl testified that only he and the teller had access to the safe containing the cash, and that Coleman did not have access to it (p. 316).

The fact, then, is that at the time of the Fillmore conversation Coleman was not being "trusted in positions affording greatly enlarged opportunities for stealing," but, on the contrary, had been relieved in the preceding November of a position affording him a better opportunity.

The question, of course, is as to how the matter should have appeared to the directors. Had they discussed the situation, they would, of course, have come to the conclusion that Coleman in 1908 had practically no opportunity for stealing. *Had the possibility of his employing the exact method which he did employ been suggested to them, it would have been dismissed as a method which could not have escaped detection by the cashier for a single week.*

The master's findings are plainly right that "there was no way, apparently, by which a mere book-keeper could draw money from the bank or its depositaries except possibly by forgery, which would soon have been exposed" (p. 91), and that Edwin Dresser had no reason "to believe, or even to suspect, that a mere book-keeper could in any way reach and appropriate the funds of the bank" (p. 95).

The fact that Coleman, after he ceased to be teller, was *not* in a position affording apparent opportunity for stealing is obviously one of the most important facts in this case, and the mistake of the Circuit Court of Appeals in this regard is correspondingly serious and tends to throw discredit upon the conclusion reached by the court.

(b) *Dresser did not know of Coleman's Speculations*

With respect to this matter, the majority of the Circuit Court of Appeals assumed that the case came within the

doctrine of *Preston* v. *Prather*, 137 U. S. 604, and thereby committed another and most serious error.

The present case is distinguishable from *Preston* v. *Prather*, in the first place, because in that case the assistant cashier, who was known to be engaged in stock speculations, had free access to the vaults where the bonds which he stole were deposited, whereas in the case at bar Coleman apparently had no access to anything which he could steal. That the result in *Preston* v. *Prather* would have been different if the person engaged in speculation had not had access to the cash and securities of the bank is indicated by the statement of the court that it was gross negligence for the defendants, after learning of the assistant cashier's speculations, "not to discharge him *or place him in some position of less responsibility*" (137 U. S. at p. 612).

But, apart from this, the present case is wholly unlike *Preston* v. *Prather*, because there is no justification whatever for a finding that Dresser had any knowledge of Coleman's speculations.

The finding of the master was positive that Dresser did *not* know that Coleman speculated in stocks (pp. 40, 94–95). The master says:—

> "Mr. Dresser did not know that Coleman was speculating in stocks. On one occasion, the time of which was not fixed or indicated by the testimony, Coleman spoke to Mr. Dresser in regard to one or two copper stocks, and as to whether they were going up or down, saying that he was going either to sell or to buy, the evidence not indicating which he was going to do; that Mr. Dresser told him he didn't know anything about them, and was not interested in them; that Coleman's question was a general one, and was accompanied by no statement of details of ownership of, or interest in, the stocks; that Mr. Dresser paid no further attention to the matter, and made no inquiries of

his own, either of Coleman or anybody else, as to how or why Coleman was interested in the stocks; . . . I also find that his inattention to Coleman's question is not now to be charged to him as negligence that ought to make him responsible for Coleman's subsequent peculations. It seems to me that Coleman's mere inquiry as to the price of a stock, and the frank statement of a desire or an intention to either buy or sell some, is not alone sufficient to suggest dishonesty or to require an examination or audit of the books of the bank. . . . He had no reason at that time to believe, or even to suspect, that a mere book-keeper could in any way reach and appropriate the funds of the bank" (pp. 94–95).

There is no possible justification for upsetting the master's finding that Dresser did not know of the stock speculations. The only basis for the contrary conclusion is the single conversation to which the master refers, and obviously that does not require a different finding from that made by the master. In any event, the date of that conversation not being known, it may have taken place at a time just before the closing of the bank, which would make it utterly immaterial in this case.

The District Court did not reverse the master's finding as to Dresser's ignorance of the speculations, but Judge Bingham contented himself with finding, what was admittedly true, namely, that there was *evidence* that Dresser knew of Coleman's interest in stocks. Judge Bingham's statement is merely this:—

"There was also evidence that Coleman was in the habit of ordering stocks over the telephone which was in the banking room and that he frequently spoke to Mr. Edwin Dresser about stocks. Mr. Dresser admitted that Coleman said to him at one time that he was going to buy or sell some copper stock" (p. 205).

There *was* evidence, undoubtedly, of the kind referred to, but the master did not believe it, nor does Judge Bingham say that he did, even assuming that he would have had the right to reverse the master's finding under such circumstances. It is plain that the District Court does not reverse the finding and that therefore the case came to the Circuit Court of Appeals with the fact established that Dresser had no knowledge of the speculations.

Before considering the manner in which the majority of the Circuit Court of Appeals dealt with this subject, it will be well to summarize briefly *all* the evidence relating to it.

Dresser testified to the conversation reported by the master (pp. 1166–1167, 1179) and he also testified that he knew nothing about Coleman's speculating; that he never knew that he bought or sold copper stocks and had never been present when he telephoned to stock-brokers (pp. 1166, 1178). The *only* testimony that Dresser did have any knowledge about these matters came from Lockhart, who had been employed in the bank as messenger from January, 1904, when he was fifteen years old, until about August, 1907, and who then left the bank but used to go back at times and do work there at the request of the cashier (pp. 862–864). Lockhart was Coleman's go-between in taking the fraudulent checks to the brokers' offices in Boston and obtaining the cash (p. 748), and he was the man who at Coleman's suggestion was employed to keep the depositors' ledger when Coleman was away (p. 312). Lockhart's position was a peculiar one to say the least, and his testimony tending to show that everybody in the bank must have known of Coleman's speculations was so inconsistent with all the other testimony as well as with the probabilities, that the master evidently disbelieved it *in toto*. Lockhart undertook to say that from the time of his first employment at the bank

Coleman regularly telephoned to brokerage offices in Boston, several days a week, giving orders to sell or purchase stocks for him, using the bank's telephone, which was not in a booth, but entirely exposed, and situated not more than six feet from the cashier's desk and twelve feet from the teller; that there was no concealment about it, and that it continued as long as Coleman was there. He further testified that "at least one or two days a week, sometimes oftener" he had heard Coleman talking with Mr. Edwin Dresser about different stocks and how the market was going (pp. 864–865).

This testimony, so improbable as to be absurd on its face, was inconsistent with everything else in the case.

Dresser testified, as above stated, that he was entirely ignorant of the speculations.

Paul, who was teller from November, 1907, to the close of the bank, and whose desk was only a few feet from the telephone, testified in answer to written interrogatories (p. 1358). He did not testify that Coleman telephoned orders for stock or that he talked with Dresser about stocks. He did testify that he knew nothing of Coleman's method of spending money (p. 1360).

Bragg and Cutting, former tellers, were called as witnesses by the receiver almost immediately after Lockhart, but neither one testified that Coleman ordered stocks over the telephone in the bank or ever talked with Dresser about stocks (pp. 875–886).

Coleman, also called as a witness by the receiver, gave no such testimony.

Earl, whose desk was, as has been stated, in close proximity to the telephone, and who was in the bank daily from 1903 to its close, testified positively that he knew nothing of Coleman's speculating (p. 315).

These men—Paul, Bragg, Cutting, Coleman, and Earl —were all of the executive and clerical force of the bank

from 1904 to its close who testified in this case, with the exception of Lockhart. They were all called by the receiver, and their testimony plainly contradicts Lockhart, as do all the probabilities of the situation. Furthermore, Lockhart was justly under suspicion on account of his connection with Coleman's fraud and his work on the very book where the frauds were concealed. The master did not consider him a credible witness in this regard and rejected his testimony.

This being the state of the record, it is plain that the master's finding that Dresser knew nothing of Coleman's speculative habits must stand.

> "The case is preeminently one for the application of the applicable rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.'"
>
> *Adamson* v. *Gilliland,* 242 U. S. 350, 353.

Turning now to the way in which the Circuit Court of Appeals treated this matter, it will be found that the majority dealt with it very unfairly and in a way which the record unquestionably does not justify. Having in mind the fact that the District Court, without reversing the master, had merely found that there was *evidence* that Dresser knew of Coleman's interest in the stock market, it is interesting to note that in the majority opinion of the Circuit Court of Appeals there is at the outset a similar statement, to wit:—

> "There was evidence that before the fall of 1908, and in fact ever since 1904, it had been Coleman's frequent practice to give orders to brokers for the purchase or sale of stocks, over a telephone in the bank within a few feet of

> the cashier's desk and in the next room to that occupied by Dresser when present at the bank. There was also evidence that Coleman had talked on more than one occasion with Dresser about stocks" (p. 1658).

What the evidence was has just been stated. As the master disbelieved it and the Circuit Court of Appeals did not venture to say that it believed it, the fact that there was evidence on the subject is immaterial. The court proceeded, however, to deal with the matter in a most unwarrantable way, and first by saying:—

> "If Dresser is to be credited with entire ignorance in the fall of 1908, that Coleman was interested in the stock market, he must be supposed to have paid no attention whatever to what went on in his immediate presence" (p. 1658).

What does the court mean by the reference to what went on in Dresser's presence? So far as the telephoning was concerned, even if Lockhart's testimony were believed, it had no tendency to show that Dresser was ever present in the banking-room when Coleman telephoned about stocks, nor even that he was in the directors' room, which he used when at the bank and which was separated from the banking-room by a storeroom (p. 606; Exhibit 130, p. 1439).

The court then refers to "what had been brought to Dresser's notice about Coleman's . . . dealings in stocks" (pp. 1658–1659). It is manifest upon this record that *nothing* had been brought to Dresser's notice about Coleman's stock transactions. The single conversation referred to by the master cannot be of any significance, as has been stated, for the reason among others that its date remains utterly indefinite and it therefore may have been after the stealings were practically complete.

Worst of all, however, is the final statement on this

subject in the majority opinion of the Circuit Court of Appeals, namely, the statement that examination of the books "would have shown Dresser that what he had been told about Coleman's speculative habits . . . was true" (p. 1660). Even Lockhart did not testify that Dresser had been *told* anything. The quoted statement from Judge Dodge's opinion is in the highest degree unjustifiable, and is an error which undoubtedly affected materially the court's conclusion as to the weight to be given the Fillmore conversation. Judge Brown's statement in his dissenting opinion cannot be controverted:—

> "There is also meagre evidence that Coleman had discussed copper stocks with Dresser. The master specifically found that Dresser had no knowledge that Coleman was speculating in stocks, and it is evident that a contrary finding, or a finding that Dresser had reasonable cause to suspect Coleman of stock gambling, cannot justly be based upon the very meagre evidence on this point."

Whatever the basis of the error committed by the majority of the court may have been, it must have been highly prejudicial to the case of Edwin Dresser. The court appreciated that it was doubtful whether the so-called Fillmore warning, taken by itself, was of sufficient significance to be made the basis of such extraordinary liability as it was imposing upon Edwin Dresser, and consequently sought to bolster it up by references to other matters alleged to be within Edwin Dresser's knowledge. Much the most important of these matters is the stock speculations. The plain error of the court in attributing knowledge of them to Edwin Dresser is enough to vitiate its conclusion that the Fillmore warning fixed him with liability. The Fillmore warning came to one who did *not* know that Coleman was speculating and had no suspicion of it.

(c) *Coleman's Ownership of an Automobile was not a Cause for Suspicion*

With reference to the automobile, Judge Dodge in the majority opinion says that it was " a piece of apparent extravagance on the part of a twelve-dollar-a-week clerk" which should have aroused Dresser's suspicions (p. 1658).

Upon this point Judge Brown says in his dissenting opinion:—

> "Another and distinct 'warning' is found in Coleman's ownership of an automobile—'A clerk at $12 a week with an automobile!' Like the expression, 'there is a thief in the bank,' this is given a false value if dissociated from the rest of the facts.
>
> The master had before him evidence that Coleman, after bank hours, was engaged in the automobile business, had sold a number of automobiles, one to a director of the bank; that the young man though working at a small salary, lived at home with his father, who was reputed to be of good financial standing, and the testimony of a witness who said that Coleman's father was reputed wealthy and that it did not surprise him to see the son have an automobile; also testimony that the price of the automobile—$800—was paid for in part by commissions on sales of other machines, and that Coleman made no concealment of the machine, but invited persons connected with the bank, including Dresser, to ride with him" (p. 1670).

Judge Brown's statements are accurate. (See master's report, pp. 78–79, 84–85.)

The statement of the majority that Dresser did not know how Coleman had paid for the car is an erroneous deduction from the master's finding that the directors did not investigate the matter.

The reasons why no special investigation was made by

the directors are plain. It was well known in the bank that Coleman was selling the Kissel Kar and that he was treasurer of that company at one time (p. 338). When he bought the car he had gone into details with Earl as to the commissions he was earning and how he had paid for the car, and it was Earl's recollection that he had told these facts to Edwin Dresser (p. 332).

Edwin Dresser testified that he knew that after banking hours Coleman worked for somebody in Boston selling automobiles (p. 1167). His son and co-director, Sumner Dresser, knew that Coleman had the automobile and learned upon inquiry that he was selling automobiles and had bought a demonstration car out of his commissions (p. 1295). He also knew that Coleman's father "was a wealthy man and could well afford to give him an automobile if he wished to do so" (p. 1324). Barber, one of the other directors, knew that Coleman was selling Kissel Kars and himself bought one of him (p. 1270), and Gale, the remaining active director, knew that Coleman "was having some kind of connection with the Kissel Kar Company, which had a store out at Cambridge; that he had sold some cars for them; and that he had an opportunity to get a car at practically cost, or something of that sort" (p. 1249).

The unexplained possession of an automobile by a twelve-dollar-a-week clerk is one thing, and the possession of one by an automobile salesman who uses it openly in connection with his work is an entirely different thing. If the court had had this fact in mind and had also considered that the clerk lived at home with his father, who was a man of means, it is not reasonable to suppose that it would have found that the clerk's possession of a second-hand $800 demonstrating car was an "apparent piece of extravagance," which should have suggested at once to Dresser the need for active investigation.

It must be borne in mind that the other directors knew as much as Edwin Dresser did about the automobile; that there was nothing about it which in the view of the court charged *them* with the duty to investigate or with any liability.

The court states that Coleman's ownership of the automobile should have aroused Dresser's suspicion "as it did later the suspicions of persons not connected with the bank's management." The two persons referred to are H. Douglass Campbell and Dr. Wetherbee. It appears that about a year before the bank failed Edwin Dresser called on Campbell to ask him to endorse a note of his father's in renewal of a prior note which the son had endorsed. Campbell testified that in answer to Dresser's request he made the following remarks:—

> "I said I guessed I would stay off. I don't think the bank needs any money, anyway, making the remark in a jocular way; that Mr. Dresser said 'Why?'; I replied, 'Why the young men ride around in automobiles,' to which Mr. Dresser said, 'Well I walk.' I then said, 'Well if I had some one working for me, and I was walking and he was riding, I should probably find out where he got his car,' or words to that effect. This was practically the entire conversation. Coleman's name was not mentioned in the conversation" (p. 289).

These remarks, made as the witness said "in a jocular way," hardly justified the inference that Campbell's "suspicions" had been aroused, and in any event could not have been expected to carry serious weight with Dresser, who already knew about the reason for Coleman's ownership of the car.

So far as Dr. Wetherbee is concerned, his testimony showed merely that in the summer or fall of 1909 he told the defendant Barber that he "didn't think it looked

well to see that automobile standing in front of the bank so much." He did not say whose automobile it was and he never had any talk with any of the other directors or with the president regarding the matter (pp. 292–3). It does not appear from this that the feeling aroused in Wetherbee by the appearance of the automobile in front of the bank was one of "suspicion" of Coleman.

It is solely upon the basis of the foregoing testimony of Campbell and Wetherbee that the court rests its assertion that Coleman's ownership of the automobile aroused "the suspicions of persons not connected with the bank's management!"

The master made a specific finding on the question whether Coleman's possession of an automobile was a circumstance which should have aroused suspicion:—

> "I am requested to find, as a fact, that his ownership and use of this car ought to have put the directors, and particularly Mr. Edwin Dresser, the president, on their guard, to have made them suspicious of his honesty and caused them to have his books examined; also, that because they did not do these things they were negligent, and should now be held liable because they did not. Numerous requests are made to this effect.
>
> I cannot and do not find that whatever Coleman did in the automobile business was the cause of his stealing; or that his stealings went into the business or had anything to do with it" (p. 79; and see the paragraph beginning at the bottom of page 84).

The statement in the receiver's brief (pp. 150–151) that money was stolen for the benefit of the Kissel Kar Company is entirely unjustified. False credits were given by Coleman to other accounts than those of this Company, as for example, the account of Henry Thayer

& Co. (p. 996), and those of John T. Webster (p. 1019), Frank A. Andrews Co. (pp. 1028, 1036), W. Fillmore Co. (p. 1031), Austin Ford & Sons Co. (p. 1038), and other accounts named by the witness Fraser (pp. 994, 1013, 1017). There is no evidence that a dollar of the stolen money was received by the Kissel Kar Company (whose account was not opened until July 14, 1909, p. 339), any more than there is evidence that false credits on the other accounts benefited the particular depositors.

There is no evidence that the automobile was purchased with stolen money nor that the facts which Earl reported to Edwin Dresser and the other directors with reference to the circumstances of Coleman's ownership of the car were not entirely true. Under these conditions there can be no ground for contending that the facts regarding the automobile ought to have aroused the suspicions of Dresser.

(d) *Dresser's Duties as President were limited and did not include any Duty of special Vigilance as to possible Misconduct by Coleman*

The Circuit Court of Appeals begins by referring to Edwin Dresser as the "executive head" of the bank and then goes on to say that "he had been accustomed to deal personally with matters such as shortages of teller's cash, or their discharge when found by him incompetent or careless" (p. 1650). The court later says that Dresser was "relied upon . . . by the other directors particularly in matters concerning the hire and discharge of employees" (p. 1658) and that it was "his plain duty . . . to know the character and habits of the bank's employees." The findings that Edwin Dresser was "accustomed" to deal with the discharge of tellers and that he was "relied upon" by the other directors in matters concerning the

hire and discharge of employees rest upon no sufficient foundation (see p. 18, *supra*), and the ruling that he was bound to know the character and habits of the bank's employees is obviously bad law. Edwin Dresser was *not* the executive head of the bank. Neither the master nor the District Court so found, and the evidence is entirely insufficient to sustain such a finding by the Circuit Court of Appeals.

The court plainly confuses the duties of the unpaid president of a small bank with the duties of the cashier. It is the cashier, not the president, who is the chief executive officer of a national bank of this character and who has supervision of the other employees of the bank. See the cases heretofore cited (p. 63–64, *supra*).

The National Bank Act, as has been pointed out, does not impose upon the president any greater duties as to the details of the bank's management or supervision of its employees than upon any other director, nor do the articles of association of the City Bank (pp. 1364–1367) nor its by-laws (pp. 1370–1374). The articles of association and the by-laws, on the other hand, plainly contemplate that the cashier shall have all the duties incumbent upon him under the general law.

Edwin Dresser did not interfere with the supervision of the bank by the cashier. Not only did he never discharge an employee, but there is no evidence that he ever employed one, except Earl's statement that messengers were usually employed by himself and the president (p. 321.) So far as the evidence shows who employed the different tellers, book-keepers, and messengers, it appears that they were employed either by the directors or by Earl (pp. 525, 529, 863, 882).

It certainly cannot be held that because Edwin Dresser gave close attention to the duties that did devolve upon him, consisting mainly of the investments of the bank's

funds, for which he received no compensation of any kind, he can for these reasons be held to a greater degree of responsibility than the other directors in reference to the performance of other duties he was not qualified to perform, which he did not assume or attempt to perform, and which were in fact performed by a properly chosen cashier.

Edwin Dresser gave only a small part of his time to the affairs of the bank, and he received no compensation for his services. He was engaged in other business enterprises, and, as is customary with the president of small banks, "the time he gave to the bank was devoted largely to the matter of making investments" (Opinion of the District Court, p. 179). He gave, indeed, an unusual amount of time to this work and admittedly performed it with ability and discretion. It appeared that on a couple of occasions many years before he had talked with two different tellers about shortages in their cash and had on one occasion requested the resignation of a teller, who was also a director.

> "He was not an accountant or book-keeper; and was not familiar with bank methods of keeping either individual or general accounts, but left that to the cashier, whose duty it was to supervise the actual keeping of the accounts, the discounts, maturities of paper, etc." (p. 64).

There is no evidence that he ever undertook to discharge an employee of the bank. On all matters outside the investment of the bank's funds, he relied upon the cashier.

The assertion in the receiver's brief (p. 7) that he managed "the daily active business of the bank" is wholly unfounded if it refers to anything more than the investments.

The receiving of deposits, the making of payments to depositors, the keeping of the accounts, the payment of

expenses (p. 1373), the safe-deposit business, the safe-keeping of the funds and the property of the bank (p. 1371), and the control of the clerks necessary for the transaction of the bank's business were entirely in the hands of the cashier, who was at the bank all day, and was the only paid officer. The president had nothing to do with any of the daily routine matters in charge of the cashier.

The loss to the bank in the present case did not occur in the department of the bank's business over which the president and directors exercised control, which was well run (pp. 80, 1174), but took place in a department of the bank's business which was in charge of the cashier (p. 96), and was made possible by the cashier's failure adequately to check one detail of the bank's accounting system, whereby one of the clerks who had the title of bookkeeper and whose duty it was to post the individual ledger, was enabled to secure the cashier's unwitting assent to the payment of the clerk's fraudulent checks, and to conceal the payments from the cashier in an ingenious and novel way by a series of false entries on the ledger kept by him.

That the daily conduct of all the bank's business, except the making of loans and investments, was entirely in charge of Earl, was shown beyond peradventure.

Coleman was Earl's subordinate in the business of the bank and did not have any direct relations with the directors in their official capacity (p. 325).

It was Earl with whom Coleman took up the question of changing the form of the depositors' ledger (pp. 533, 534).

It was Earl who selected the substitute for Coleman when he went on vacations (p. 637).

It was Earl with whom Coleman discussed adopting the envelope system in the bank (p. 842).

It was Earl or the teller whom Coleman was supposed to notify if a customer overdrew his account (p. 843).

It was Earl who gave Coleman leave to be absent from the bank (p. 312).

It was Earl who took up with Coleman the statement of Lombard that it was reported that Coleman was keeping a woman, and who then reported the result to Edwin Dresser (p. 321).

It was Earl to whom Coleman, when he first got his automobile, gave the explanation of the circumstances in connection with his possession of it, which explanation Earl reported to Edwin Dresser (p. 332).

Earl employed Coleman (p. 525). He made him bookkeeper (p. 529).

All the evidence shows that Coleman had direct relations only with his superior, Earl.

The bank examiners reported to Earl the result of their examinations, and he told the directors what the bank examiners said to him about the condition of the bank (p. 334).

The cashier checked the teller's cash at the end of every day (p. 320). He also checked Coleman's work at the end of every day (pp. 340, 578, 581, 584, and 585).

Earl gave a reference to Bragg, the teller, when he left (p. 876).

Earl and the teller were the only ones who had the combination to the safe (pp. 316, 878).

Gale testified that Earl managed the bank (p. 1263).

Earl testified that the distribution of duties between the different officers of the bank was the same as in the other banks with which he had been connected (p. 313) which were small banks (p. 312).

There is no evidence in the case that Edwin Dresser ever assumed any of the cashier's duties of immediate supervision and control of the accounting system and employees. Coleman's work had to do merely with one part of the bank's accounting system. There were no official relations between him and Dresser. Dresser never undertook to supervise his work in any way and was not qualified so to do.

The Circuit Court of Appeals dealt with the case upon the basis of an exaggerated conception of the duties of the unpaid president of a small bank and a confusion of his functions with those of the cashier.

The ruling that it was Edwin Dresser's plain duty "to know the character and habits of the bank's employees" (p. 1659) is wrong on any theory. As it is undisputed that Coleman was an employee of the bank, that his character was criminal, and that one of his habits was stealing the bank's money, this ruling was in itself sufficient to compel the court's conclusion that Edwin Dresser was liable for not putting a stop to Coleman's stealings.

The president and the other directors of a national bank are of course *not* bound to know the character and habits of the bank's employees. They are bound to exercise only reasonable care in the premises, and they are entitled to rely upon the cashier without making any investigation themselves, unless something unusual occurs which makes it incumbent upon them to take some action. This is plain upon the authorities above cited (see pp. 59–60, *supra*).

The conclusion of the majority of the Circuit Court of Appeals that Dresser's disregard of the Fillmore charges should render him liable may well have been influenced in large part by the exaggerated notion entertained by

the judges as to the scope of his duties as president of the bank.

(e) *Dresser was under no Duty to examine the Depositors' Ledger*

Having held that the directors, including Edwin Dresser, were under no obligation to examine the depositors' ledger (pp. 1648–1657), the court, in dealing with the Fillmore incident, proceeds to say:—

> "The correctness of Coleman's entries on the depositors' ledger might have been tested by Dresser more readily than by any of the other directors. Means for detecting errors in them were more constantly and more readily available to him than to them, because of his daily presence in the bank as its executive head, and the fact that his own personal deposit account and that of the company controlled and managed by him were two of the largest on the bank's books. They were the two more frequently manipulated by Coleman than any others on the depositors' ledger, when it suited his scheme of concealment to charge the sum taken by him to an individual account as if drawn by the depositor, or to drop an individual depositors' apparent balance without entering any charge to justify the drop.
>
> Although Dresser kept no check book showing by its stubs what checks had been drawn, he had data enabling him to tell at any time how much ought to be standing to his credit on the bank's books; and the occasions were numerous and common upon which any examination of either account as shown on Coleman's ledger must have shown him gross error in the balance there appearing. Examination enough for this purpose he might have made at any time in a few minutes, on his own statement. He never attempted anything of the kind, but remained content with the monthly showing of his pass books, which Coleman took care to have always correct. In Dresser's testimony he admitted that he knew the way the deposi-

tors' ledger was kept, and had occasionally looked it over; but he never had done so to see whether it was correctly kept.

Examination of Coleman's figures as above by Dresser in October and November, 1908, would have compelled further investigation."

In substance the court seems to hold that one of the reasons why the Fillmore incident was decisive was because Edwin Dresser could have looked at the ledger and detected errors. The court does not go to the extent of saying that it was his *duty* to make personal examination of the books, and could not have said so in view of what it had already decided, and the well-settled law.

As a matter of fact, the court is in error in saying that an examination by Dresser in October and November, 1908, would have compelled further investigation. The undisputed evidence shows that from June 30, 1908, to December 8th, Edwin Dresser's account on Coleman's books was correct (pp. 45, 690, 1122); and that the account of Dresser's company was correct in 1908 until November 10th, when it became short to the extent of $2,000 (p. 696). It thus appears that in point of fact an examination of either account by Dresser, at the time of the Fillmore warning, would *not* have led to any further investigation.

It happens that within a few days of the Fillmore incident, to wit, on November 16, 1908, the directors made one of their examinations of the bank and found everything apparently all right (p. 70), although they did not examine Coleman's ledger, as they had no reason to believe that the statement presented by the cashier did not show the deposits correctly. Edwin Dresser took part in this examination. At that time, and indeed on every day from November 10, 1908, to November 30, Cole-

man had his book in readiness for the bank examiner, and, as the District Court found, "the footings of his balance column were correct, and an addition of them would correspond with the sum due depositors on the cashier's ledger" (p. 189).

On November 30, 1908, the bank examiner came, examined Coleman's ledger as well as the other books of the bank, and saw nothing suspicious.

The foregoing facts serve to show that there is no justification for Judge Dodge's statement that an examination of Coleman's books by Dresser in October and November, 1908, would have compelled further investigation.

(f) *Facts not appearing in Evidence in this Case should not have been considered by the Court*

In the majority opinion of the Circuit Court of Appeals is the following statement:—

> "Moreover, and by way of illustration, it appeared from Coleman's testimony in the trial of this cause before the master that during this period he was engaged in faro bank gambling in New York" (p. 1660).

The *only* testimony in the case that Coleman was at any time engaged in faro bank gambling was his own testimony with respect to the first money he ever stole from the bank, $2,000 in amount, "I believe that was in connection with a faro bank in New York" (p. 530). There was no testimony concerning his trips to New York except that of Paul, who testified that he knew of Coleman's going there in the spring, summer, and fall of 1909 and the following winter (pp. 1360–1361), but what the purpose of those trips was nowhere appeared.

The master found: "From a time early in 1907 down

to the closing of the bank there was evidence tending to show, and I find, that Coleman was spending money freely in Boston and living a fast life" (p. 78). The master also found that the directors knew nothing about it. Apart from the evidence that Coleman was speculating in stocks, a fact which, as has been shown, the directors did not know, there was no *evidence* to justify the master's finding as to the fast life which Coleman was leading, however plain it may be, after the event, that he must have been leading such a life. There was an offer of proof (p. 299) which was excluded, and beyond that there was nothing. Fillmore's statement to Dresser, "I believe he is living a pretty fast pace" (p. 297), is not evidence of the fact. There is nothing more in the record, and hence a finding that Coleman was leading a fast life, if it means any more than that he was speculating in stocks, cannot be justified.

The Circuit Court of Appeals not only refers to Coleman's "fast life" (p. 1657), but proceeds to go completely outside the record in this case and to refer to the facts concerning Coleman's "stupendous losses at faro" in New York, which appeared in evidence at the trial of one Keliher (193 Fed. Rep. 8), who was associated with Coleman in looting the bank. Keliher's name does not appear in the present record, except when Coleman testified that he was a witness at the Keliher trial (p. 670), and no evidence was produced before the master that Coleman had any associate or accomplice, yet the Circuit Court of Appeals in passing upon the case appearing in this record intimates that all the facts which appeared in the other case, at a trial at which the directors of the bank were in no way represented, could readily have been ascertained by them.

It is impossible to tell, without knowing the facts, whether Coleman's gambling in New York could have

been readily discovered or not. It stands to reason that it was concealed to the full extent to which Coleman's extraordinary abilities enabled him to conceal it. Indeed, if the gambling could readily have been ascertained on reasonable inquiry, it is impossible to believe that the directors would not have heard rumors of it from depositors or friends or from other employees of the bank.

The rights of Edwin Dresser's estate should not be prejudiced in any way by a reference to facts not appearing in this record.

4. *The apparent Decline in Deposits not being calculated to arouse the Suspicions of the Directors generally, the Fact that Dresser had received the Fillmore Warning had no tendency to cause it to present a different Aspect to him*

With reference to this matter the majority of the Circuit Court of Appeals said:—

> "From our conclusion that Edwin Dresser's negligence in disregarding Fillmore's statements about Coleman had made him responsible for the failure to discover and stop the stealings ever since the end of November, 1908, it follows that he, at least, is also responsible for the failure to discover and stop them when the above apparent abnormal shrinkage in deposits was under consideration by the directors. To him alone had come notice of facts which ought to have led him to suspect the need of complete investigation as to Coleman's doings in the bank; and it had ever since been in his power to use those methods of inquiry which, as above stated, were more readily and constantly available to him than to any other director. Here was additional reason brought to his notice in September, 1909, for suspicion that something wrong might be going on within the bank, and a reason which should have had

especial force with him because of the notice received by him months before, but never imparted to his fellow-directors" (pp. 1662–1663).

Obviously, the reference to September, 1909, is an error, as the court had just stated that there was no abnormal shrinkage in deposits "before the last ten days of October, 1909, at the earliest" (p. 1662).

To what does the court refer in stating that to Dresser alone had come "notice of facts which ought to have led him to suspect the need of a complete investigation as to Coleman's doings"?

The single talk with Coleman about copper stocks may be disregarded, as has been pointed out above, for a variety of reasons, and among other things because its date is not fixed in any way, so that it may have been in 1903 or it may have been only a few days before the closing of the bank.

The facts about the automobile were known to the other directors as well as to Dresser.

There remains only the Fillmore conversation in October, 1908. This is the *sole basis* for the suggestion that in the fall of 1909 Dresser had any knowledge of suspicious facts not known to the others. To suggest that that conversation which took place fully a year before should have been called to Dresser's mind by the fall in deposits is to go far beyond what is reasonable. The conversation must have long since passed from Edwin Dresser's recollection, as it would have from any one's. The bank had continued prosperous and everything seemed normal until the fall of 1909. Coleman's conduct continued apparently irreproachable, and nothing had occurred to throw doubts on the accuracy of his books or on the thoroughness of the cashier's supervision. Then came the marked decline in deposits, a condition which never be-

fore in the history of banking, so far as known, had indicated that there was thieving in a bank, and which, as has been stated, did not suggest it in this case either to the bank examiner or to the two experienced bank men who became directors of the City Bank in January, 1910.

So far as the directors other than Edwin Dresser are concerned, the Circuit Court of Appeals held that the evidence fell *"far short"* of requiring a finding of negligence on their part, yet because a year earlier Fillmore had spoken a sentence or two to Dresser, in which he made certain statements about Coleman expressly based on hearsay and conjecture, which seemed entirely unfounded at the time and which nothing since occurring had tended in any way to substantiate, it is now suggested that Dresser should have recalled what was then said and connected it with the decline in the deposits of the bank. It is submitted that *no one* would have connected the two matters.

G. THERE WAS NO NEGLIGENCE WITH RESPECT TO ANY OF THE MATTERS SET FORTH IN THE RECEIVER'S "SPECIFICATIONS OF NEGLIGENCE"

In the brief for the receiver (pp. 85–89) twenty-two matters are specified with respect to which it is claimed that the directors were negligent. A brief consideration of these matters will show that the few which are of importance have already been considered and that there is nothing in the others.

1. "In putting a boy less than eighteen years of age in sole charge of the depositors' ledger," etc.

The present case does not arise out of errors committed by a youthful and inexperienced book-keeper, but out

of a scheme of fraud perpetrated by a young man of unusual ability,—a scheme which so young a man was least of all likely to devise and carry through.

The master, the District Court, and the three judges of the Circuit Court of Appeals all concurred in finding no negligence before September 30, 1907, and hence in finding that there was no negligence in putting Coleman in charge of the depositors' ledger in January, 1904.

2. "In retaining him as such book-keeper without ascertaining how frequent and careless were his mistakes," etc.

Such mistakes as Coleman may have made are of no consequence in this case, and in none of the opinions below is there any suggestion that they were.

3. "In disregarding the plain warning of Mr. Wright, the auditor employed by the bank in 1903 and 1904. . . . regarding the importance of this deposit ledger and the care with which it should be kept."

Every one knows that the deposit ledger as well as all the other books of a bank or any other business concern should be carefully kept. In the case of a bank, that does not mean that the directors may not rely on the cashier's supervision over the keeping of any particular book, in the absence of a warning that it is not being properly kept. Mistakes such as Mr. Wright had in mind obviously cut no figure in the present case.

None of the judges below has suggested that there was any negligence on the part of the directors because of the Wright "warning."

4. "In causing no supervision to be kept over this young book-keeper. Or if it is seriously contended that they thought Mr. Ezzl was keeping some such super-

vision, in never ascertaining that Earl was doing nothing of the kind."

The directors had a right to rely on Earl's supervision in the absence of notice that he was not doing his work properly, and it cannot be contended that there was any evidence of such notice. As the Circuit Court of Appeals held, the directors of the bank

> "cannot be held responsible merely because of the deficiencies permitted by Earl to exist in the methods of routine followed in conducting the bank's regular operations or in recording them on its books, notwithstanding that it was by taking advantage of such deficiencies that Coleman was enabled to accomplish and conceal his stealings. They were entitled to rely, as they did, upon Earl to guard against any such deficiencies, and until some special necessity for such action was brought to their attention, they were under no duty to inquire or interfere independently of him" (p. 1651).

5. "In being ignorant that Earl . . . was actually permitting the book-keeper to open the clearing house envelopes and take out the checks, Earl himself, for the most part, never seeing the checks," etc.

This is a matter of detail which the directors obviously could leave to the cashier. None of the judges below has suggested that there was any negligence in this respect.

6. "In giving no weight to the extraordinary fact that three tellers in succession were short in their cash," etc.

These shortages occurred in 1904 and 1905 (pp. 74–77). After Coleman became teller in October, 1905, there were no more shortages in the teller's cash. As to the earlier of the shortages referred to, Mr. Wright, the auditor, made an examination and reported that it was his opin-

ion that they were due to "inaccuracies in handling the cash and general work" (p. 75). There was certainly no ground for suspecting Coleman, and the argument that the directors were liable for his subsequent defalcations because of these earlier shortages of other tellers found no favor with any of the judges below.

7. "In making Coleman teller as well as book-keeper, and thereby rendering it perfectly easy for him to steal, and conceal his stealings," etc.

In addition to acting as book-keeper, Coleman served as teller from October, 1905, to November, 1907. During this period he stole about $30,000 (p. 81). Nine-tenths of his thefts occurred after he ceased to be teller and ceased to have the handling of the cash. There is no evidence of anything which should have indicated to the directors that he was not a proper person to act as teller. This is another argument of the receiver's which has found no favor with any magistrate who has heard this case.

8. "In assuming, if they ever thought about it at all, that the bank examiners' necessarily rapid examination twice a year . . . was the equivalent of an audit," etc.

The directors did *not* assume that the work of the bank examiners was the equivalent of a thorough audit, which would have involved calling in the depositors' pass-books and would obviously have required more time. They had a right to assume, however, that any elaborate scheme of fraud which involved doctoring the books would be detected by the bank examiners. As has been said before, there was no evidence that audits of national banks by outside accountants are customary or frequent. Whatever may be the custom in metropolitan banks, it is certainly reasonable for the directors of a small suburban

or country bank to expect that if an audit is desirable the bank examiner will recommend it.

9. "In neither making nor causing to be made any investigation regarding the habits and methods of life of Coleman."

As has been shown, the directors of a bank are not bound to spy upon their employees or to investigate their habits and methods of life. "Until some circumstance transpires to awaken a just apprehension of their want of integrity [the directors] have a right to assume that they are honest and faithful." *Warner* v. *Penoyer,* 91 Fed. Rep. 587, 590.

10. "In neither making nor causing to be made any real investigation of the remarkable fact that a twelve-dollar-a-week book-keeper was able to own a good automobile," etc.

This matter has been discussed above.

11, 12, 13, 14. The alleged warnings received from Fillmore, Lombard, and Campbell have been considered above.

15. "In permitting numerous meetings of the directors to be skipped without adequate excuse."

Even if this were the fact, no one could contend that it was in any sense a proximate cause of the losses suffered by the bank.

As a matter of fact the meetings were held with a very considerable degree of regularity. There were forty-nine meetings in 1907, forty-eight in 1908, and forty-three in 1909, and in the last of these years, at any rate, there were good reasons for the omission of various meetings (pp. 65–66).

16. "In disregarding, for long periods and without any excuse, the express provisions of the by-law requiring semi-annual examinations by the directors," etc.

This matter has been sufficiently dealt with above.

17. "After becoming aware that Coleman was either buying or selling copper stocks, utterly disregarding that fact," etc.

This, like certain of the other specifications of negligence, is expressly stated to apply to Edwin Dresser only. It has been pointed out that it is conclusively shown by this record that Edwin Dresser did *not* know that Coleman was buying or selling copper stocks.

18. "In persuading Richardson to become a director when it was known that Richardson would be unable to attend to his duties as a director," etc.

This is another example of those contentions of the receiver which have not been accepted by any of the judges below.

19. "In doing nothing particular as to investigating the causes while the deposits of the bank were apparently shrinking from about $368,000 to $107,000," etc.

20. "In accepting totally unfounded guesses of Mr. Earl and of the other directors of the bank as to the real cause of the apparent shrinkage," etc.

The matter of the shrinkage of deposits has been dealt with above.

21. "In having no audit or careful examination of the books of the bank after July, 1903, a period of almost seven years."

There is no evidence in the record that audits are customary, and there *is* evidence that in small banks they

are not customary (p. 1311). In the absence of circumstances seeming to require an audit, the law is clear that bank directors are not negligent in not ordering one.

22. "In permitting Coleman, then aged less than twenty, to have the combination of the cash box and actual access to the bank's cash from the time he became teller."

Before Coleman was made teller he had been intrusted with large amounts of cash which he had safely carried to Boston (p. 337). There was nothing to indicate to the directors that he could not safely be made teller and given access to the cash, nor did anything occur to arouse suspicion during his occupancy of the position (p. 77). After he ceased to be teller in November, 1907, he had nothing more to do with the handling of the cash (pp. 53, 192, 1648), nor did he thereafter have any access to the box or safe in which the cash was kept (p. 316). All the judges below agreed with the master in declining to find any negligence with respect to the matter of access to the cash.

H. THE RECEIVER'S CRITICISMS OF PORTIONS OF THE MASTER'S REPORT ARE FOR THE MOST PART ENTIRELY UNJUSTIFIED AND THE MINOR ERRORS POINTED OUT DO NOT AFFECT THE MASTER'S CONCLUSIONS.

The receiver's brief (pp. 115–164) contains a lengthy and detailed criticism of the master and his report, much of it being mere argument against the validity of the master's conclusions.

In various instances clerical errors and minor inaccuracies in figures are referred to (see pp. 123, 124, 133–135, 147, 149, 152, 153), which might obviously have been

called to the master's attention at one or another of the numerous hearings on the draft report, but which were evidently reserved by counsel in the belief that they would aid in the attack to be made in court on the report.

Here and there are reflections upon the integrity and good faith of the master, which are totally indefensible (see pp. 115, 120, 129, 138, 143).

Two of the matters especially stressed in the receiver's brief may be noted to show the unfairness of much of the criticism.

Over and over again objection is made to the statements of the master that Coleman was a mere bookkeeper and had nothing to do with the actual handling of the cash or the securities (see pp. 135, 158, 162), the objection being based on the fact that obviously Coleman did have to do with the handling of the cash during the period when he was acting as teller, as well as bookkeeper, namely, from October, 1905, to November, 1907. The master himself states more than once that Coleman acted as teller during the period referred to (Record, pp. 32, 77), and it is perfectly plain upon a reading of the report that the findings objected to are intended to be applicable only to the time after Coleman ceased to be teller.

Again, the receiver severely criticises the master (Brief, pp. 117–122) because of his statement, after describing Exhibit 13, that "examination of the other exhibits referred to shows a similar situation on each day" (Record, p. 42).

The exhibits in question, fifty-six in number, showed the total amount of checks received for payment on certain days from the clearing house, the Shawmut Bank, and the First National Bank. The exhibits also contained a small slip showing the amount of the checks on the City Bank which had been deposited with the clearing

house by the National Union Bank of Boston. No small slips showing the amount of the checks deposited by any other bank with the clearing house were included, but the amounts due the other banks were shown on the large clearing house slip. The master, after stating that he deemed it of consequence to note that the large clearing house slips showed the number of other banks, besides the National Union, with which checks on the City Bank had been deposited, went on to say that Exhibit 13 showed that ten banks sent checks through the clearing house, and that, with the National Shawmut and the First National Bank, which had also received checks on the City Bank, there were on the day in question twelve banks receiving checks on the City Bank. He then added, "It will be observed that while the amounts vary, there were two of the banks that received checks for amounts larger than the amounts received by the National Union Bank" (p. 42). He then states, in a separate paragraph, that "examination of the other exhibits referred to shows a similar situation on each day." The "similar situation" obviously refers to the situation described in the whole of the preceding paragraph and not merely to the last sentence of the paragraph. What the master deemed of consequence was, as he expressly stated, the fact that a large *number* of banks besides the National Union were sending checks for collection to the City Bank.

The receiver attempts not only to limit the "similar situation" to the last sentence of the preceding paragraph alone, but even to have it understood that among the "banks that received checks for amounts larger than the amounts received by the National Union Bank" the National Shawmut and the First National Bank were not to be included in spite of the fact that the master expressly included them. It is true that on fifty-three of the particular fifty-six days covered by the fifty-six ex-

hibits, the demands of the National Union Bank were larger than the demands of any other bank sending its checks through the clearing house, but it is equally true that on twenty-five of those fifty-six days the demands of the Shawmut or First National Bank, or both, were larger than the demands of the National Union Bank. See Exhibits 6, 7, 8, 9, 10, 13, 14, 16, 20, 23, 28, 33, 38, 42, 48, 49, 50, 51, 66, 67, 68, 69, 70, 72, 73 (pp. 1382–1407).

The master appended to his report eleven of the fifty-six exhibits (see p. 41). Had he been actuated by the sinister motives attributed to him by counsel for the receiver, he would doubtless have chosen the eleven exhibits from the twenty-five above mentioned, instead of including only three of those among the eleven. The very fact that he selected the eleven which he did is the best evidence that the "similar situation" which he had in mind was not primarily the situation with respect to the size of the demands of the National Union Bank, but the situation with respect to the *number* of other banks with which checks of the City Bank had been deposited, this being a matter which, as he expressly stated, he deemed of consequence in passing upon the negligence of the directors.

The whole matter is not of the slightest consequence as bearing on the issues presented in this case, but it is an illustration of the kind of criticism to which the master's report is subjected.

The few errors or inaccuracies which are shown to exist in the report relate to matters of detail, principally in the book-keeping, and cannot have affected the master's conclusions.

I. In no Event could the Estate of Edwin Dresser be held liable for so large a Sum as that named in the Decree or for Interest

1. Upon any view of the case, the sum awarded the plaintiff by the decree of the Circuit Court of Appeals was excessive. The plaintiff's cause of action, if any, is *ex contractu* (as the District Court held, p. 211), and survives against the estate of Edwin Dresser only for that reason.

Boyd v. *Schneider,* 131 Fed. Rep. 223 (C. C. A. 7th Circ.).

Allen v. *Luke,* 141 Fed. Rep. 694; *S. C.* 163 Fed. Rep. 1018 (C. C. Mass.).

Curtis v. *Phelps,* 208 Fed. Rep. 577 (D. C. N. D. N. Y.).

The measure of damages is, therefore, subject to the rule of *Hadley* v. *Baxendale,* 9 Exch. 341, under which the plaintiff, even if a breach of contract is established, may recover only such damage as might reasonably have been foreseen as the natural and probable consequence of the breach. In view of the unprecedented methods which Coleman employed and the apparent impossibility of his making way with the bank's funds it cannot be said that the loss of so large an amount could have been foreseen as a natural or probable result of an omission to investigate the truth of what Fillmore said. If any loss whatever was reasonably to be apprehended from such an omission,—something which this defendant, of course, earnestly denies,—it was, at the very most, the loss of an amount much less than the total of Coleman's actual defalcations. It follows that, whatever may be the true view of the case on the question of liability, the decree of the Circuit Court of Appeals was erroneous. If the bill

is not dismissed, the case should be remanded to the District Court for a reassessment of damages.

This was the view taken in the Circuit Court of Appeals by Judge Brown, a part of whose opinion on this point is as follows:—

> "If it be conceded that the proofs are sufficient to show that Edwin Dresser was negligent in failing to heed warnings of Coleman's untrustworthiness, and if we apply the rule that notice sufficient to put one on inquiry is notice of everything to which inquiry might have led, this, in my opinion, should lead not to the affirmance of the judgment against Dresser for the full amount of Coleman's defalcations, but rather to sending the case back to the District Court for a reassessment of damages.
>
> The plaintiff's evidence fails to show to what extent Coleman's appropriation of the bank's funds was due to any of the matters of which it is claimed Dresser had notice.
>
> It must be borne in mind that this is not an action of tort. In view of the decision of the District Court that the action against Dresser's administrator survives because the cause of action is *ex contractu* rather than *ex delicto* (229 Fed. 798), there is special force in the defendant's argument that the liability is only for such loss as was the natural and probable consequence of negligence, and which ought to have been foreseen in the light of attending circumstances. Negligence is a failure to take reasonable precautions against that which is reasonably to be apprehended (pp. 1670–1671).
>
> . . . . . .
>
> A court of equity called upon to measure a just compensation for breach of a contractual duty is not required to apply the rule of damages applicable in cases of wanton or wilful wrong. The damage to be recovered should be the natural and proximate consequence of the act complained of, and those results considered proximate which

the wrong-doer from his position must have contemplated as the probable consequence of his breach of contract. . . . That Coleman, a book-keeper constantly under the supervision of a cashier, and whose fidelity bond was fixed at the sum of $5,000, as a reasonable measure of the risks incident to his position, would have either the opportunity or the temptation to do what the appellee's brief characterizes as 'the seemingly impossible' was far outside the bounds of reasonable foresight. I know of no authority which visits upon one, who has failed in the performance of a contractual duty damages beyond the limits of what reasonably ought to have been foreseen, or which condemns him in damages to the extent of what is 'seemingly impossible'" (p. 1672).

2. The Circuit Court of Appeals rightly denied the plaintiff's motion to amend its decree by adding the words "interest on the said amount [*i.e.*, the amount of Coleman's defalcations from December 1, 1908, to the close of the bank] to run from February 1, 1916, the date of the final decree in said District Court" (pp. 1673-1675). In a suit in equity the allowance of interest, like that of costs, is in the discretion of the court. Even if a decree is affirmed *in toto*, interest is not to be added to the amount awarded by the original decree unless the mandate of the Appellate Court so provides and that court may, if it sees fit, refuse to allow interest.

Rule 30 (§ 3) of the Circuit Court of Appeals for the First Circuit.

Consolidated Rubber Tire Co. v. *Diamond Rubber Co.*, 232 Fed. Rep. 508 (D. C. S. D. N. Y.).

Hagerman v. *Moran*, 75 Fed. Rep. 97 (C. C. A. 9th Circ.).

Green v. *Chicago, Saginaw & Canada Railroad Co.*, 49 Fed. Rep. 907 (C. C. A. 6th Circ.).

The fact that a case is close and that the appellant has not received any profit from the transactions in question or acted in bad faith but is charged because of default on the part of another is sufficient to warrant the Circuit Court of Appeals in refusing to award interest.

Hemmenway v. *Fisher,* 20 How. 255.
Merritt & Chapman Derrick & Wrecking Co. v. *Morris & Cummings Dredging Co.,* 137 Fed. Rep. 780 (C. C. A. 2nd Circ.).
Sargent v. *American Bank & Trust Co.,* 80 Ore. 16, 39.
Winfield Mortgage & Trust Co. v. *Robinson,* 89 Kans. 842.

This is true, *a fortiori,* if, as in the case at bar, the amount awarded by the decree of the District Court is held to be excessive and the plaintiff is not allowed to recover at all except upon grounds entirely different from those relied on by the District Court. It is elementary that interest is not recoverable upon an unliquidated demand, and the plaintiff's claim in such a situation cannot be regarded as liquidated prior to the decision of the Circuit Court of Appeals.

Illinois Central Railroad Co. v. *Turrill,* 110 U. S. 301.
Johnston v. *Gerry,* 34 Wash. 524.
Gillespie v. *Fulton Oil & Gas Co.,* 161 Ill. App. 248.
Erwin v. *Jones,* 191 S. W. Rep. 1047 (Mo. App.).

In citing the first of these cases as showing that interest should be allowed from the date of the decree of the District Court, the plaintiff (Brief, p. 203) is under a

misapprehension. The decision of this court was in substance that, where the amount awarded by the Circuit Court was excessive because improper items had been included, interest ran from the subsequent filing of a master's report stating the amount recoverable on the basis prescribed by this court.

In any event, no interest can be allowed from the date when the decree was entered by the Circuit Court of Appeals, since the plaintiff, as well as the defendant, Edwin Dresser, has appealed from that decree.

The Rebecca Clyde, 12 Blatch. 403.
The Express, 59 Fed. Rep. 476 (C. C. A. 2d Circ.).
Skipwith v. *Cinch,* 2 Call, 253.

IV

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either witnesses should be affirmed and the decree of the Circuit Court of Appeals modified accordingly.

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